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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

COMMONWEALTH OF KENTUCKY,
CABINET FOR HUMAN RESOURCES,
DARVIN ALLEN,
P. KENNETH COX,
JOHN HODGKIN,
RONALD HOLLAND
LYNNE MCWILLIAMS,
MARGARET WHITTET
AND FRANK J. WILLEY, *Petitioners,*

versus

MAGGIE WILLIAMS, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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102 pp

QUESTIONS PRESENTED

Williams is the former Office Manager of the Department for Employment Services offices in Winchester and Richmond, Kentucky. Williams charged that certain individuals were engaged in political patronage activities and selling of job referrals. She was subsequently demoted. The United States Court of Appeals for the Sixth Circuit ruled that the individual defendants were not entitled to qualified immunity on Williams' First Amendment claims because a reasonable state official should have understood that adverse personnel actions against Williams, based upon her charges of political patronage, would violate her rights under the First and Fourteenth Amendments. The questions presented are:

1. In light of *Waters v. Churchill*, 511 U.S. —, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994), are state officials entitled to qualified immunity when they reasonably conclude that an employee's charges of political corruption are baseless and false?

2. In light of *Waters v. Churchill*, 511 U.S. —, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994), are state officials entitled to qualified immunity when they reasonably conclude that harm to government operations from an employee's speech outweighs her interest in speaking?

LISTING OF PARTIES

Following is a list of parties to this proceeding.

Plaintiff/Respondent:
Maggie Williams

Defendants/Petitioners:
Darvin Allen
John Hodgkin
Ronald Holland
Lynne McWilliams
Margaret Whittet
Frank J. Willey

and the following Defendants dismissed at various stages of the litigation:

Commonwealth of Kentucky
Cabinet for Human Resources
P. Kenneth Cox

Pursuant to Supreme Court Rule 29.1, there are no corporations and therefore, no parent or subsidiary companies, which are parties to this proceeding.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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The Commonwealth of Kentucky, Cabinet for Human Resources, Darvin Allen, P. Kenneth Cox, John Hodgkin, Ronald Holland, Lynne McWilliams, Margaret Whittet and Frank J. Willey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 24 F.3d 1526 (1994) (App., *infra*, pp. A1-27). The opinion and supplemental opinion of the trial court (App., *infra*, pp. A30-49 and A53-64, respectively) are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. 14. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ky. Rev. Stat. Ann. § 18A.095. ***See*** **Appendix at A67.**

Ky. Rev. Stat. Ann. § 61.102. ***See*** **Appendix A75.**

STATEMENT OF THE CASE

This case presents issues of fundamental importance to the proper balancing between the government's interests as an employer and the First Amendment rights of government employees. The Sixth Circuit's rulings on these issues are in clear conflict with this Court's decision in *Waters v. Churchill*, 511 U.S. —, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994).

A. THE UNDERLYING FACTS

In this 42 U.S.C. § 1983 action, plaintiff Maggie Williams ("Williams") claims that defendants violated her rights under the First and Fourteenth Amendments to the United States Constitution by demoting her in retaliation for her comments about political patronage and corruption. Williams also claims that the defendants' actions violated her rights to procedural due process pursuant to the Fourteenth Amendment and violated Kentucky statutory and common law.

Williams was first employed by the Commonwealth of Kentucky in April 1966. She became a full-time employee of the Cabinet, performing administrative duties in a subdivision of the Cabinet devoted to employment and training services, in June 1968. Williams was promoted in February 1985 and became Local Office Manager in the Winchester office of the Department for Employment Services ("DES"). As Manager, Ms. Williams' duties included:

- Becoming familiar with statutes and regulations applicable to conducting operations of DES local offices.
- Directing administration of DES programs relating to employment, training and unemployment insurance.
- Reviewing staff performance to assess services provided to job seekers, unemployment insurance claimants and outside employers. Reviews included preparation of annual service plans, quarterly service appraisals and analysis of office productivity.
- Communicating to staff and the public regarding program changes and availability of services.
- Resolving complaints from staff, job seekers, unemployment insurance claimants, employers, and community groups.

- Making recommendations to the Director of Field Services for changes in staffing, personnel actions and other matters affecting the office.

Williams was given substantial responsibility for working with her staff and the community to ensure that the programs her office administered were generally known and that DES services were efficiently and professionally provided to the public. Because Williams had no previous experience with unemployment insurance programs, she was expected to work closely with the Unemployment Insurance Supervisor in the Winchester office, Mavis Shearer ("Shearer").

These expectations for Williams' performance were frustrated almost immediately. Williams began a campaign of verbal abuse against Shearer, calling her a "cow," "bag of wind" and "Miss Piggy." Far from making any effort to work with Shearer for the benefit of the office and the public she was hired to serve, Williams' harassment of Shearer became so serious that within four months of Williams' arrival in Winchester, Shearer wrote to DES Commissioner James Daniels to complain about Williams' pattern of abuse. Nevertheless, Williams' harassment of Shearer continued; Shearer made several additional complaints about Williams' behavior and filed formal grievances against Williams on seven different occasions between 1986 and 1989.

Williams had the responsibility as office manager to resolve such personnel situations in order to promote the office mission to the public. Instead, she escalated the situation by retaliating. Williams reprimanded Shearer twice in 1986, requested additional disciplinary action in 1987 and 1988 and made a steady stream of informal complaints about Shearer between September 1987 and March 1989.

Ms. Williams' superiors tried to accommodate her stream of demands. Indeed, Shearer was suspended at Williams' request for three days in May 1987. At the same time, Williams' superiors urged Williams and Shearer to keep their personal conflicts out of the office and behave in a professional manner. By November 1987, however, Williams and Shearer were exchanging allegations of job-related misconduct on an ongoing basis. By April 1988, Williams had allowed the office to deteriorate to such a degree that it was necessary for Williams' immediate superior, Field Services Director Kenneth

Cox ("Cox"), to issue instructions for such basic office functions as mail distribution and notification for taking leaves of absence.

In December 1988, Williams and Shearer exchanged another series of charges about job performance. On January 11, 1989, DES Acting Commissioner Margaret Whittet ("Whittet") met with Williams and Shearer. Whittet gave each a verbal reprimand for a continuous pattern of unprofessional conduct and warned that further disciplinary action would result if the situation did not improve.

But the situation did not improve; instead, it became obvious that Williams was allowing her feud with Shearer to substantially interfere with the performance of the office mission to the public. In March 1989, Williams and Shearer blamed each other for the failure of the Winchester office to make timely reports of an unemployment insurance inventory list. In April 1989, members of public agencies working with the Winchester office began to make written complaints about the conduct of that office. On April 10, 1989, the Manager of the DES Quality Control Branch reported that Williams had become abusive towards his staff during a visit to the Winchester office and ordered that no Quality Control mail should be sent to Shearer. Two days later, Cox warned Williams that recordkeeping problems in the Winchester office could threaten the federal funding for that office.

In response to the rapidly worsening turmoil, Cox and Whittet recommended that both Williams and Shearer be given administrative reviews to determine what, if any, disciplinary action should be taken. Separate reviews were scheduled, but Shearer resigned before her review.

Williams was notified formally of her administrative review on July 6, 1989. Her review was held on August 22, 1989. Ms. Williams appeared at the hearing with her counsel, Mr. Paul Fauri. Mr. Fauri refused to allow management representatives to present the charges and claimed that "[T]he charges are vague and cannot be responded to, and we're not going to sit here and listen to people coming in and trying to make charges against Ms. Williams." Before the first witness was called, Williams and her counsel left the hearing. The Cabinet's Department of Personnel then continued the hearing, with Cox questioning witnesses about Williams' conduct in the Winchester office.

The new DES Commissioner, Darvin Allen ("Allen"), carefully reviewed the transcript of the hearing. Allen concluded that Williams deserved at least a suspension. However, Cox gave Williams another

opportunity to improve her performance: Williams received a written reprimand as the next step in progressive discipline.

As Williams' feud with Shearer was escalating, Williams was making charges of misconduct against her superiors and against employees under her supervision. Williams attended a meeting of DES office managers in Louisville in November 1988 at which she alleges that political patronage was discussed. During the first half of 1989, Williams charged that Franklin Gibson, an employee in the Richmond DES office, had engaged in political and personal activity on the job and had submitted falsified travel vouchers. Williams claims to have reported these matters to the Kentucky Attorney General's office as well as to the Kentucky State Police.

Allen sent an independent employee, Ron Holland ("Holland"), to investigate the situation in the Winchester office and make appropriate recommendations for improving the chaotic conditions there. During several days in the Winchester office, Holland discovered that Williams had found a new target for her abusive behavior, Senior Employment Interviewer James Little ("Little"). Holland reported that Williams was "factionalizing" the office into "her" supporters against employees sympathetic to Little. Additionally, Williams had accused Little of making job referrals for political or improper purposes. Holland recommended to Allen that Allen visit the Winchester office and make clear that factionalism, abusive conduct and other unprofessional behavior would not be tolerated.

Holland and Allen visited the Winchester office in November 1989. Allen ordered all employees to keep personal disputes and dislikes outside the office. By memorandum dated November 15, 1989, Allen specifically directed that all employees refrain from making abusive or derogatory comments toward co-workers, job claimants, job seekers or other members of the public. Less than three weeks later, the Cabinet received a letter from a job claimant complaining about abusive conduct in the Winchester office. By early 1990, Williams was making allegations that Little was "selling" jobs or job referrals through the Winchester office.

Once again, it was necessary for Williams' superiors to intervene. On March 6, 1990, Holland and Field Services Director John Hodgkin ("Hodgkin") made another visit to the Winchester office. Holland and Hodgkin made it clear that Allen's November 1989 Memorandum meant what it said — that employees were to stop intra-office bickering and any form of abusive behavior directed toward members

of the public. Holland and Hodgkin also said that if any employees had specific complaints, they should put them in writing.

Evidence of Williams' misconduct and mismanagement continued to accumulate:

- On March 7, 1990, Winchester office employee Catherine Egleston ("Egleston") sent a letter complaining about continued factionalism and abusive behavior in the Winchester office.

- On April 16, 1990, Egleston sent another letter documenting Williams' abuse of Winchester office employees, and other allegations.

- On April 18, 1990, Little filed a formal grievance against Williams for falsely accusing him of engaging in criminal vandalism and other wrongdoing. He also accused Williams of demoting him from his former placement duties without just cause, and he also accused her of encouraging or at least allowing fraudulent timekeeping in the Winchester office.

- On April 22, 1990, Winchester office employee Sharon Wallace sent a letter to Holland documenting allegations that Williams harassed employees and even enlisted certain employees to "watch" everyone else in the office.

- On April 23, 1990, Allen received a letter from Winchester office employee Catherine Joslin which documented Williams' retaliation against Joslin for accepting a Christmas gift from Little. Ms. Joslin also described Williams' allegations that Little stole money from another employee's desk and Williams' charges that her immediate superior, Cox, "was a cripple" who "beat his wife."

Because Williams' allegations about the Winchester office included charges of "selling" jobs and fraudulent timekeeping, Allen requested a formal investigation by the Office of the Inspector General ("OIG"). Since Williams was clearly the epicenter of the chaos in the office, the target of many charges and the maker of many others, Allen requested and received authority to assign Williams to the DES Georgetown office temporarily. During Williams' absence, she was replaced by Teresa Patton Prewitt ("Prewitt").

OIG investigator Michael Lawrence ("Lawrence") began his investigation, but it quickly became clear that the necessary scope of the inquiry and Ms. Williams' delays in making herself available for an interview would delay the completion of his work. Allen therefore requested and received permission to extend Williams' assignment to Georgetown through an administrative procedure known as special duty. Throughout Williams' temporary assignment and detail to special duty, her salary remained unchanged and she retained her status as a state government employee within the merit system.

After Prewitt began working in the Winchester office, she discovered what appeared to be a series of violations of DES conflict of interest regulations during Williams' tenure in the handling of unemployment insurance claims. Prewitt requested and received a separate investigation of Winchester office claims handling. On July 6, 1990, while the OIG investigation continued, Internal Security Supervisor Darryl Boggs ("Boggs") reported that five Winchester office employees had handled claims for relatives, in violation of conflict of interest regulations. Boggs also concluded that the employees had handled these claims improperly because Williams had allowed them to do so, or had failed to instruct them in proper claims handling procedures. After reviewing Boggs' report, his supervisor concluded that in some cases employees had forged claimants' signatures.

On October 3, 1990, Lawrence, the OIG investigator, delivered his report. After reviewing the report, Holland recommended to Allen that Williams should be terminated or demoted for the following reasons:

- Williams gave preferential treatment to the office employees by allowing selected "favored" employees to violate established regulations for accounting for travel and time out of the office and by refusing to help selected "disfavored" employees seek advancement through the state government merit system.

- Williams continued a pattern of abuse toward employees and members of the public even after she received Commissioner Allen's Memorandum of November 15, 1989, directing that such conduct must cease for the good of the office.

- Williams continued to factionalize the Winchester office by threatening to retaliate against employees who associated with Mr. Little.

Because Investigator Lawrence had not made any specific recommendations, after reviewing Lawrence's report and Holland's recommendations, Allen asked DES Regional Supervisor James Thompson ("Thompson") to review Lawrence's report, conduct any additional fact-finding which he believed was necessary, and recommend whether disciplinary action should be taken against Williams.

Thompson reviewed the Lawrence report and conducted supplemental interviews of employees in the Winchester office. In November 1990, during these supplemental interviews, office employee Debbie Collins reported that Williams had directed an after-hours break-in at the Winchester office in order to search through Mavis Shearer's desk and personal effects. Collins also confirmed that Williams had authorized employee violations of established travel and leave regulations for selected employees.

Meanwhile, in February 1991, while the Thompson investigation was continuing, Williams alleges that she told the Georgetown Police Department and an unnamed agent of the Federal Bureau of Investigation about her litany of charges against her superiors and employees under her supervision.

Thompson concluded that Williams should be fired for insubordination and possibly criminal misconduct in her management of the Winchester office. Commissioner Allen requested a demotion for Williams on May 24, 1991.

On May 29, 1991, Lynne McWilliams, Acting Executive Director, Office of Personnel Management, issued an eighteen page letter setting forth a detailed list of thirty-two charges against Williams and demoting her effective May 30, 1991. This letter does not rely upon Williams' charges of political corruption and selling of job referrals as a basis for her demotion. Darvin Allen instructed Hodgkin and Thompson to deliver the letter to Williams and to afford Williams the "opportunity to read this [the letter] and then if she had any questions to attempt to address them if [they] could." Effective with her May 30, 1991 demotion, Williams was assigned to the DES Lexington office. Her assignment in Lexington has been made permanent.

B. THE LAWSUIT

Williams filed this action on May 3, 1991, asserting claims under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. The action is thus within the subject matter jurisdiction of the District Court pursuant to 28 U.S.C. § 1331.

Following a series of amendments and dismissal of certain claims, the plaintiff's Fourth Amended Complaint, filed April 23, 1992, asserted claims for:

Count I: Wrongful demotion under color of state law without due process, in violation of 42 U.S.C. § 1983.

Count II: Wrongful demotion under color of state law in retaliation for exercise of First Amendment rights, in violation of 42 U.S.C. § 1983.

Count III: Wrongful demotion in retaliation for "whistle-blowing" in violation of Ky. Rev. Stat. Ann. § 61.102 (Baldwin 1986).

Count IV: Wrongful demotion without "just cause," in violation of Ky. Rev. Stat. Ann. § 18A.095 (Baldwin 1988).

Count V: Common law wrongful discharge.

Williams named a total of nine defendants in her Fourth Amended Complaint: the Commonwealth of Kentucky, the Cabinet and seven state employees, Allen, Cox, Hodgkin, Holland, McWilliams, Whittet and Willey (the "State Officials").[1]

On March 27, 1992, the defendants moved for summary judgment on all federal claims, including the First Amendment claim at issue in this petition. The defendants argued that the Eleventh Amendment barred the federal claims and that the state employee defendants were entitled to qualified immunity from plaintiff's claims. Subsequently, on August 10, 1992, Williams moved for partial summary judgment on her due process claim.

On January 22, 1993, the District Court entered its Order and Judgment, together with a Memorandum Opinion. (App., *infra*, pp. A30-52). On April 28, 1993, a Supplemental Opinion and Order and Judgment were entered by the District Court (App., *infra*, pp. A53-

[1] By Memorandum Opinion and Order dated January 22, 1993, the District Court dismissed all claims against the Commonwealth of Kentucky and the Cabinet for Human Resources. Defendant Kenneth Cox was dismissed by Order dated January 15, 1993 on statute of limitations grounds. Accordingly, the remaining defendants are Allen, Hodgkin, Holland, McWilliams, Whittet and Willey.

66). The District Court held that, because a genuine issue of material fact existed regarding the reasons for Williams' demotion, the defendants' motion for summary judgment based upon qualified immunity must be rejected.[2]

1. The Appellate Decision[3]

The Sixth Circuit held that qualified immunity is proper unless a reasonable public official would understand that taking personnel action against Williams because of her speech about alleged political corruption violated her First Amendment rights. Decision dated May 26, 1994, at 12 (App., *infra*, p. A9). Williams' rights were violated if (1) the speech regarded a matter of public concern, and (2) Williams' interest in speaking was not outweighed by the Cabinet's interest in efficiency. Decision dated May 26, 1994, at 12 (App., *infra*, p. A10).

The Court held, relying upon this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), that speech about political corruption related to matters of public concern. The only way of avoiding this conclusion, according to the Court, was if Williams knowingly or recklessly made false statements. Decision dated May 26, 1994, at 14-15 (App., *infra*, pp. A12-13). The burden of proving falsity was on the State Officials, said the Court, and that burden had not been carried. Decision dated May 26, 1994, at 15-17 (App., *infra*, pp. A12-14). The Sixth Circuit held that all the State Officials had shown was that Williams may not have had a substantial basis for her statements, and "[t]his would be relevant only if her statements were actually false." Decision dated May 26, 1994, at 16, n.3 (App., *infra*, p. A13,

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[2] At the same time, the Court rejected the defendants' defense of qualified immunity and the Eleventh Amendment bar as applied to the due process claim and granted Williams' motion for partial summary judgment on that claim. Subsequently, on April 20, 1993, the defendants moved the District Court to vacate its January 22 Order and Judgment as applied to the due process claim based upon newly discovered evidence. That motion is currently pending before the District Court, where this action is scheduled to be tried on October 11, 1994.

[3] The District Court's ruling denying the State Officials' motion for summary judgment on the First Amendment claim based upon qualified immunity was a final decision over which the Sixth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985); *Crutcher v. Commonwealth of Kentucky*, 883 F.2d 502, 503 (6th Cir. 1989); *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988).

n.3). Therefore, the Court concluded that Williams' statements were about matters of public concern.

The second step in the inquiry, according to the Court, is determining whether Williams' interest is outweighed by the state's interest in promoting efficiency as an employer. The Court held that the relevant disruption for purposes of this test is disruption arising from the speech itself, not other factors, and the Court said that the Cabinet had failed to introduce any evidence that Williams' speech was disruptive. Decision dated May 26, 1994, at 17-18 (App., *infra*, pp. A13-15). Therefore, the Court held, a reasonable official should have known that taking action based upon Williams' statements would violate her rights, and the defendants were not entitled to qualified immunity. Decision dated May 26, 1994, at 18-19 (App., *infra*, pp. A15).

REASONS FOR GRANTING THE WRIT

This case presents issues of fundamental importance to the proper balancing between the government's interests as an employer and the First Amendment rights of government employees. The Sixth Circuit's rulings on these issues are in clear conflict with this Court's decision in *Waters v. Churchill*, 511 U.S. —, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994), handed down by this Court five days after the Sixth Circuit handed down its ruling in this case, in at least two ways. In *Waters*, this Court held that the issue of whether a government employee may be disciplined for speech is governed by the facts as reasonably found by the employer. In this case, the Sixth Circuit rejected the State Officials' qualified immunity defense using the version of the facts claimed by the plaintiff. In *Waters*, this Court held that a government employer's interest in efficiency is of "significant" value in First Amendment analysis of employment decisions. In this case, the Sixth Circuit ignored evidence of harm to government interests arising from the speech at issue and relegated the government employer's interest to a minor one.

I. The Sixth Circuit's Holding on the First Amendment Issues is in Direct Conflict With This Court's Holding in *Waters v. Churchill*

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court set forth a test for determining whether speech by a government employee may, consistent with the First Amendment, serve as a basis for disciplining

or discharging that employee. The Court held that the initial issue was whether the challenged speech regarded matters of public concern. *Id.* at 145. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Once that determination is made, it must be determined whether the employee's interest in speaking is outweighed by the government's interest in efficient operations. *Id.* at 142.

In *Waters v. Churchill*, this Court decided the issue of whether the *Connick* test should be applied to what the government employer thought was said by the employee, or to what the trier of fact ultimately determines to have been said. *Waters*, 114 S.Ct. at 1882. The Court held that the *Connick* test for determining whether speech can be the subject of adverse employment action is to be applied using **the facts as reasonably determined by the employer**. *Id.* at 1888-89.

In reaching its conclusion in *Waters*, this Court recognized that the efficient operation of government offices requires that employers must be free to apply their reasoned experience to investigating an employee's speech, without worrying that they might eventually be held liable for their actions because a jury, acting months or years later without the full range of information available to the employer, questioned their conclusion:

> The problem with the Court of Appeals' approach — under which the facts to which the *Connick* test is applied are determined by the judicial factfinder — is that it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw. If she relies on hearsay, or on what she knows about the accused employee's character, she must be aware that this evidence might not be usable in court. If she knows one party is, in her personal experience, more credible than another, she must realize that the jury will not share that personal experience. If she thinks the alleged offense is so egregious that it is proper to discipline the accused employee even

though the evidence is ambiguous, she must consider that a jury might decide the other way.

> But employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused . . . It is true that these practices involve some risk of erroneously punishing protected speech. The government may certainly choose to adopt other practices, by law or by contract. But we do not believe that the First Amendment requires it to do so. Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

114 S.Ct. at 1888.

The facts of this case are quite similar to those presented in *Waters*. Although the State Officials deny that Williams was demoted because of the speech she alleges in her Complaint, the State Officials who knew about Williams' charges responded in an entirely reasonable manner based upon their years of experience. Williams' charges were investigated by the OIG at the request of Allen and were determined to be false and groundless, a conclusion accepted in good faith by the State Officials. Even Williams refused to offer support for her own charges. When directly asked about her charges of job-selling, Williams responded "I couldn't prove anything about selling jobs for any worker. I've heard rumors for twenty years." Report of Special Investigation dated October 3, 1990, at 93 (Sixth Circuit Joint Appendix ("J.A."), Vol. II, p. 467).

The Sixth Circuit acknowledged in its opinion that this Court's holding in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) does not extend First Amendment protection to "false statements that are knowingly or recklessly made." Decision dated May 26, 1994, at

15, (App., *infra*, p. A12), *citing Gossman v. Allen*, 950 F.2d 338, 342 (6th Cir. 1991). The court noted Williams' admission that she had no proof of her charges, but concluded that "**[a]ll Williams' admission shows is that she may not have had a substantial basis for making her statements that certain employees were selling jobs. This would be relevant only if her statements were actually false.**" [Emphasis added] Decision dated May 26, 1994, at 16, n.3 (App., *infra*, p. A13, n.3).

The Sixth Circuit thus concedes the crucial point in the analysis as set forth in *Waters*. The State Officials, the Sixth Circuit noted, could have reasonably believed that Williams' charges were without "a substantial basis." Given the Sixth Circuit's conclusion that the State Officials reasonably believed that Williams' charges constituted groundless and malicious rumor-mongering, the Sixth Circuit should have then considered whether such rumor-mongering was protected speech. Pursuant to this Court's holding in *Pickering*, 391 U.S. at 574, as recognized by the Sixth Circuit in *Gossman v. Allen*, 950 F.2d at 342, the answer is clearly no. But the Sixth Circuit did not so conclude, and the question of whether Williams' alleged speech "critical of political patronage employment practices in general," Decision dated May 26, 1994, at 15, (App., *infra*, p. A12) was protected speech — a question the petitioners do not concede was correctly decided by the Sixth Circuit — does not change the analysis. "An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements." *Waters*, 114 S.Ct. at 1890.

The Sixth Circuit's failure to apply the *Connick* test using the facts as reasonably found by the State Officials, in direct conflict with this Court's holding in *Waters*, infects the Sixth Circuit's entire chain of reasoning on the First Amendment issues in this case. Creating an unprecedented presumption of truthfulness for employee speech, the Sixth Circuit imposed the burden on the State Officials of proving Williams' statements false to the fact-finder. Decision dated May 26, 1994, at 15-16 and n.3 (App., *infra*, pp. A12-13 and n.3). This is precisely the burden which this Court, in *Waters*, lifted from the shoulders of government employers. 114 S.Ct. at 1888. From there, the Sixth Circuit applied the *Connick* test to the wrong version of the facts, asking whether speech on political corruption (rather than groundless and malicious rumor-mongering) was protected. Decision dated May 26, 1994, at 15 (App., *infra*, pp. A12-13). Having

concluded that the speech in question was protected, the Sixth Circuit then found that qualified immunity was not available to the State Officials, again analyzing the qualified immunity issues using the plaintiff's version of the facts rather than the facts as reasonably found by the State Officials. Decision dated May 26, 1994, at 17-18 (App., *infra*, pp. A13-15).

Because the Sixth Circuit erred at the outset in its analysis of the First Amendment issues in this case, failing to apply the *Connick* test to the State Officials' reasonable conclusions about Williams' speech, each of the Sixth Circuit's First Amendment holdings is in direct conflict with this Court's holding in *Waters*. The errors of the Sixth Circuit in analyzing these issues merit review by this Court.

II. The Sixth Circuit's Holding on Qualified Immunity in First Amendment Cases Raises Important and Unresolved Questions for All Public Employers

Government offices are no less susceptible to the disruption caused by an insubordinate employee than are their private counterparts. This Court most recently recognized this fact in *Waters*, where the Court wrote that "the government as employer indeed has far broader powers than does the government as sovereign." 114 S.Ct. at 1886. As the Court reiterated in *Waters*, the government has the power to prevent employee speech which is detrimental to the efficient operation of government offices:

> [W]e have never expressed doubt that a government employer may bar its employees from using [ ] offensive utterance[s] to members of the public, or to the people with whom they work . . . [W]hen an employee counsels her coworkers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counter-speech.
>
> * * * *
>
> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things

> that detract from the agency's effective operation, the government employer must have some power to restrain her . . . In other First Amendment contexts the need to safeguard possibly protected speech may indeed outweigh the government's efficiency interests. [Citations omitted] But where the government is acting as employer, its efficiency concerns should, as we discussed above, be assigned a greater value.

114 S.Ct. at 1886-88.

The Court earlier recognized the necessity of allowing public employers to eliminate disruption caused by employees guilty of insubordinate speech in *Connick* and *Pickering*, *infra*. "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs," the Court wrote in *Connick*. 461 U.S. at 149. In order to determine whether speech is protected, the Court held, "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150. A public employer is not required to "tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.

Moreover, this Court emphasized in *Waters* that courts should give substantial weight to the reasonable predictions of government officials of harm to government operations arising from employee speech.

> [W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative . . . [W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern.

114 S.Ct. at 1887.

In this case, the Sixth Circuit recognized that, in order to determine whether Williams' First Amendment rights were violated by her

demotion, the court must consider whether Williams' interest in making the challenged speech is outweighed by the state's interest in promoting the efficiency of public services. Decision dated May 26, 1994, at 16 (App., *infra*, p. A13). The Sixth Circuit held, however, that the State Officials had pointed to no evidence of disruption in the Winchester and Richmond DES offices caused by Williams' speech. "There is no indication that Williams' expression of her opinion on these matters of public concern undermined working relationships in the office, interfered with her duties, or impaired discipline." *Id.* at 17 (App., *infra*, p. A14).

The Sixth Circuit was wrong. As discussed above, the State Officials concluded after a full investigation that Williams' charges of political patronage and corrupt activities were groundless, and Williams admitted in an interview that her charges about the selling of job referrals were merely the passing along of office rumors. Because the State Officials reasonably concluded that Williams' speech constituted unsubstantiated rumor-mongering, they could permissibly conclude that any minimal First Amendment protection Williams' speech might merit was outweighed by the damage to the government's interests arising from Williams' continuing to make these charges after they were investigated and discredited. The State Officials could reasonably conclude that Williams' activity tended to undermine their authority, that the continued airing of Williams' charges led to the factionalizing of the office, and that Williams' actions impaired the efficient provision of government services.[4]

Moreover, the Sixth Circuit failed to recognize that the two parts of the test set forth by this Court in *Connick* are inextricably linked. In *Waters*, this Court recognized that government employers can in the interest of efficiency make factual conclusions about their employees' speech through procedures that do not necessarily mirror the rules of evidence. 114 S.Ct. at 1885, 1888. The central issue in determining whether speech could lawfully be the subject of an adverse personnel action is not what a jury eventually determines was

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[4] The State Officials have presented hard evidence of the disruption caused by Williams' speech, including the resignation of Gibson, one of the targets of Williams' speech (District Court Record Entry No. 78, Defendants' Motion for Summary Judgment, Exhibit A at DX 111), Allen's Memorandum of November 15, 1989, directing that derogatory comments about co-workers, subordinates or supervisors cease, J.A. Vol. I, p. 205, and numerous letters of complaint from office employees about Williams' behavior. J.A. Vol. I, pp. 228-229; 241-272; 273-285.

said, but what the employer reasonably decides was said. Similarly, the balancing required of employers between the interest in speech and the government interest in efficiency should revolve around what the employer reasonably decides was said. In this case, given the State Officials' reasonable conclusion that Williams' charges were false, "[t]he Court of Appeals' decision . . . gives insufficient weight to the government's interest in efficient employment decisionmaking." *Waters*, 114 S.Ct. at 1888. The Sixth Circuit's erroneous holding, lightly rejecting evidence of harm to government efficiency arising from Williams' speech and balancing that harm against a presumption of truthfulness for Williams' speech, merits review by this Court.

The Sixth Circuit has addressed important constitutional questions with substantial and widespread implications, and has decided them incorrectly. The State Officials respectfully urge the Court to correct the errors and arrest the damage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 24, 1994

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0174P (6th Cir.)
File Name 94a0174p.06

Nos. 93-5222/5656

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAGGIE WILLIAMS, *Plaintiff – Appellee,*	)	
	)	ON APPEAL from the
v.	)	United States District Court
	)	for the Eastern District of
COMMONWEALTH OF KENTUCKY; CABINET FOR HUMAN RESOURCES; JOHN HODGKIN; RONALD HOLLAND; FRANK J. WILLEY; LYNNE McWILLIAMS; P. KENNETH COX; MARGARET WHITTET; DARVIN ALLEN, *Defendants – Appellants.*	)	Kentucky

Decided and Filed May 26, 1994

BEFORE: MILBURN and GUY, Circuit Judges; and Timbers, Senior Circuit Judge.*

MILBURN, Circuit Judge. Plaintiff Maggie Williams is a tenured employee of the Commonwealth of Kentucky with more than twenty years of service in the Cabinet for Human Resources, Depart-

* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

ment for Employment Services ("DES"), Division for Field Services. Form February 1985 until May 3, 1990, Ms. Williams was the Field Office Manager of the DES office in Winchester, Kentucky, and its satellite office in Richmond, Kentucky, where she supervised approximately thirty employees. These offices administer unemployment insurance and employment services programs for the Commonwealth of Kentucky. Williams brought this action under 42 U.S.C. § 1983 challenging her demotion from the position of Field Office Manager to Senior Unemployment Insurance Examiner.[1] She alleged that defendants violated her procedural due process rights by demoting her without prior notice and hearing and violated her rights under the First Amendment by demoting her for engaging in protected free speech. Williams also alleged violations of state law. The district court denied defendants' motion for summary judgment based on qualified immunity and granted Williams' motion for partial summary judgment on her procedural due process claim. In these consolidated appeals, the issues are (1) whether defendants are entitled to qualified immunity as to Williams' free speech claim, (2) whether the defendants are entitled to qualified immunity as to Williams procedural due process claim, (3) whether the district court erred by granting partial summary judgment to Williams on the procedural due process claim, and (4) whether the Eleventh Amendment prohibits the claims for injunctive relief.

I.

Williams' complaint and affidavit indicate that she believes the problems she experienced with her supervisors, which eventually resulted in her demotion, began in November 1988, when she attended a meeting of DES office managers in Louisville, Kentucky.

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[1] Williams named many defendants; the Commonwealth of Kentucky and the Cabinet for Human Resources, Williams' employer; P. Kenneth Cox, the Director of DES and Williams' first line supervisor; Margaret Whittet, the Commissioner, Acting Commissioner, and Deputy Commission of DES and Williams' second line supervisor; Frank J. Willey, the Acting Director of the Division of Personnel Management and Appointing Authority for the Cabinet for Human Resources; John Hodgkin, the Director and Assistant Director of Division for Field Services of DES and Williams' first line supervisor; Darvin Allen, the Commissioner of DES and Williams' second line supervisor; Ronald Holland, the Principal Assistant to the Commissioner of DES; Lynne McWilliams, the Acting Director of the division of Personnel Management and Appointing Authority for the Cabinet for Human Resources.

Williams states that at this meeting, the managers were told that they were expected to hire and promote the "Governor's people" for positions under their supervision and that failure to cooperate would result in "serious consequences." Williams alleged that the plan to hire the "Governor's people" violated the state merit system laws, and she made her position on this mater clear to her supervisors. She also informed the employees under her supervision that she would not help political employees obtain merit positions.

Williams alleged that in February 1989, defendants Cox, Whittet, and Willey caused the state to hire a political appointee, Franklin L. Gibson, as an unclassified "federally funded time limited" employee in the Richmond DES office; thus, he was placed under Williams' supervision. Gibson's job was to recruit applicants to the Federal Job Corps program. During Gibson's six-month probationary period, Williams informed defendants Cox and Hodgkin that she believed Gibson was engaging in political activities on the job and was using the DES office telephones to conduct his private business. Williams also informed defendants that Gibson failed to account to his supervisors, including Williams, for his work, time and travel activities and that Gibson had submitted a falsified travel voucher. Consequently, in June 1989, Williams recommended to defendants Cox, Whittet, and Willey that Gibson not be retained after his probationary period due to his political activities on the job. Defendants declined to follow Williams' recommendation. Williams reported Gibson's falsified voucher, and an alteration of the voucher authorized by defendant Cox, to the Kentucky Attorney General's office. Williams also reported to the Kentucky State Police her suspicions regarding Gibson's unauthorized telephone calls.

Thereafter, Williams alleges that defendant Cox attempted to force her to change her unfavorable recommendation of Gibson and that upon her refusal to comply with his request, he gave her an adverse job performance rating. Subsequently, an administrative review hearing was held in August 1989 to determine whether Williams employment should be terminated. As a result of the hearing, a formal reprimand was entered in Williams' personnel record.

In October 1989, defendant Allen instituted, and defendant Holland conducted, an investigation of Williams' management of the Winchester DES office. As a result of this investigation, defendant Allen issued a memorandum to all employees of the Winchester DES

office directing them to refrain from making derogatory comments about claimants, clients, job seekers, employer representatives, or other members of the public, as well as co-workers, subordinates, or supervisors. Notwithstanding this directive, Williams continued to report politically motivated activities of DES employees. Williams informed defendants Hodgkin, Allen, Whittet, and Holland that she suspected that James B. Little, an employee in the DES Winchester office, had "bought" Williams' job and was engaging in political patronage activities in making job referrals, soliciting or accepted gratuities from job applicants, and committing criminal acts of vandalism against williams. On April 6, 1990, Williams formally reprimanded Little for engaging in partisan political activities on the job.

In response to the reprimand, Little filed a formal grievance with defendant Hodgkin, objecting to the reprimand and requesting an investigation of Williams' management of the Winchester DES office. On April 26, 1990, defendant Allen requested the Cabinet for Human Resources' Office of Inspector General to conduct another investigation of the management of the Winchester DES office. On May 3, 1990, Williams was removed from her Field Office Management position and temporarily assigned to work as an interviewer in the DES office in Georgetown, Kentucky. Defendants state that Williams was temporarily reassigned to facilitate the investigation of the Winchester DES office. This assignment was extended through an administrative procedure known as detail to special duty until the investigation had been completed.

In February 1991, Williams reported threats she had received and acts of vandalism perpetrated against her to the police and Federal Bureau of Investigation. She also related the political activities and violations of Kentucky law allegedly occurring at DES.

After the Office of Inspector General's investigation of the Winchester office had been completed, defendant Holland recommended to defendant Allen that Williams be terminated or demoted because the investigation revealed that (1) Williams had given preferential treatment to some employees, allowing them to violate regulations, while refusing to help other selected employees seek advancement through the merit system; (2) Williams had maintained a pattern of verbal abuse toward employees and citizens in violation of defendant Allen's memorandum directing that she and other employees refrain from making such derogatory comments; and (3)

Williams had continued to "factionalize" the Winchester office by threatening to retaliate against employees who associated with Little. After additional investigation, James Thompson, the DES Regional Supervisor, concluded that Williams' should be terminated for insubordination and possible criminal conduct in her management of the Winchester office. Instead of accepting this recommendation, defendant Allen requested a demotion for Williams.

On May 30, 1991, Thompson and defendant Hodgkin hand delivered an eighteen-page letter from defendant McWilliams to Williams at the Georgetown DES office advising Williams of her demotion. The letter detailed the reasons for the demotion and concluded by advising Williams that as an employee with status in her position she was entitled to "appeal this action to the Personnel Board, within thirty (30) days after receipt of this notice." J.A. 1027.

Williams filed this action in the district court against the Commonwealth of Kentucky, the Cabinet for Human Resources, and the various individual supervisors and administrators. The individuals were sued in both their individual and official capacities. The complaint consisted of five counts: (1) deprivation of employment rights without due process under the Fourteenth Amendment in violation of 42 U.S.C. § 1983, (2) deprivation of employment rights for exercising free speech rights under the First Amendment in violation of 42 U.S.C. § 1983, (3) reprisal for reporting suspected violations of Kentucky law in violation of Ky. Rev. Stat. Ann. § 61.102, (4) demotion without just cause in violation Ky. Rev. Stat. Ann. § 18A.095, and (5) wrongful discharge. Williams sought restoration to her position as Field Office Manager of the Winchester DES office, expungement from her personnel record of all references to her reprimand and demotion, compensatory and punitive damages, attorney's fees, and a declaratory judgment that defendants violated her rights under federal and state law.

Defendants moved for summary judgment arguing that the Eleventh Amendment barred Williams' claims and that the individual defendants were entitled to qualified immunity on the federal claims. Williams moved for partial summary judgment on her due process claim. On January 22, 1993, the district court issued a Memorandum Opinion and Order and Judgment, in which the court (1) dismissed all claims against the Commonwealth of Kentucky and the Cabinet for Human Resources and the claims for monetary relief against the defendant state officials sued in their official capacities because these

claims were barred by the Eleventh Amendment, (2) held that the Eleventh Amendment does not bar claims for injunctive relief against the state officials sued in their official capacities on any claims against the state officials sued in their individual capacities, (3) held that defendants were not entitled to qualified immunity on the federal claims, and (4) granted partial summary judgment to Williams on her due process claim. The district court, pursuant to Federal Rule of Civil Procedure 54(b), stated that there was no just reason for delay and that its judgment was final and appealable.

The district court determined that defendants were not entitled to qualified immunity on the due process claim because it held that *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), clearly established that a tenured state employee must be given notice and hearing before being demoted, even though *Loudermill* involved a termination of an employee rather than a demotion. The district court granted partial summary judgment to Williams on her due process claim because (1) Williams has a protected property interest in her job, (2) *Loudermill* requires notice and hearing before depriving a person of such an interest, and (3) defendants conceded that Williams was demoted without advance notice and hearing. Appeal No. 93-5222 timely followed.

On February 1, 1993, defendants moved the district court to alter, amend, or vacate its January 22, 1993, judgment, arguing that they should have been granted qualified immunity because *Loudermill* does not clearly establish a state employee's right to predemotion notice and hearing. On April 20, 1993, defendants filed a supplemental motion to vacate the January 22, 1993, judgment on the grounds of newly discovered evidence. The newly discovered evidence was a tape recording of the conversation between Williams and defendant Hodgkin and Thompson at the time Hodgkin and Thompson delivered the eighteen-page demotion letter to Williams on May 30, 1991. Defendants argued that this conversation satisfied the predeprivation notice and hearing requirements of *Loudermill*. On April 28, 1993, the district court issued a Supplemental Opinion and Order and Judgment, reaffirming its previous holding that defendants were not entitled to qualified immunity on the due process claim and that Williams was entitled to partial summary judgment on her due process claim, and clarifying its previous holding that issues of fact concerning the reasons for Williams' demotion precluded summary judgment to defendants on the First Amendment claim on the basis of

qualified immunity. Appeal No. 93-5656 timely followed and was consolidated with No. 93-5222.

II.

On appeal, defendants[2] challenge the district court's determinations that they were not entitled to qualified immunity on both the due process claim and the free speech claim, that Williams was entitled to partial summary judgment on her due process claim, and that the claims for injunctive relief against defendants were not barred by the Eleventh Amendment.

A.

Defendants argue that they are entitled to qualified immunity because at the time Williams was demoted it was not clearly established that the Due Process Clause of the Fourteenth Amendment required that a public employee be given notice and hearing before a demotion, nor was it clearly established that the Free Speech Clause of the First Amendment prohibited adverse employment action based on statements such as Williams cites as the reason for her demotion. The district court's determination that defendants were not entitled to qualified immunity is immediately appealable as a "final judgment" under the collateral order doctrine, and we therefore have jurisdiction over these qualified immunity issues. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Because the question of whether defendants are entitled to qualified immunity is a question of law, we review the district court's determination on this issue de novo. *E.g., Walton v. City of Southfield*, 995 F.2d 1331, 1335 (6th Cir. 1993).

Government officials, such as the individual defendants in this case, have qualified immunity from personal liability for actions taken while performing discretionary functions. These officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If the right government official allegedly violated was clearly established at the time of the challenged conduct, "the immunity defense ordinarily should fail, since a reason-

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[2] Because the Commonwealth of Kentucky and the Cabinet for Human Resources were dismissed as defendants, we use "defendants" to refer collectively to the individual defendants.

ably competent public official should know the law governing his conduct." *Id.* at 818-19. For a right to be clearly established,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted). "[T]he particular conduct of the official must fall clearly within the area protected by the constitutional right, such that a reasonable official would have known that his or her conduct violated the constitutional right." *Walton*, 995 F.2d at 1336.

"In inquiring whether a constitutional right is clearly established, we must 'look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'" *Id.* (quoting *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992)).

> [I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988).

(1)

Williams' First Amendment claim rests on her allegations that she was removed and demoted by defendants in retaliation for her statements that were critical of political patronage employment prac-

tices, and because of her statements and reports to her superiors, various police officials, and others that she suspected that state employees were engaging in political patronage and other illegal activities in the Winchester DES office. On the other hand, defendants contend that Williams was removed from the Winchester DES office in May 1990, in order to facilitate the investigation of that office, and she was demoted in May 1991 as discipline for her poor management of the Winchester DES office. The district court denied defendants' motion for summary judgment on the First Amendment claim based on qualified immunity because the conflicting positions of the parties presented a genuine issue of fact as to the reasons for the actions taken against Williams. This causation analysis would be relevant to deciding a motion for summary judgment on the merits of the First Amendment claim, *see Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), but it is unresponsive to defendants' motion for summary judgment based on qualified immunity. *Gossman v. Allen*, 950 F.2d 338, 342 (6th Cir. 1991); *see also Barnes v. McDowell*, 848 F.2d 725, 733, n.9 (6th Cir. 1988) (explaining the various burdens in a public employment, free speech case), *cert. denied*, 488 U.S. 1007 (1989). For the purposes of this qualified immunity issue, defendants do not argue that they were motivated by reasons other than Williams' speech, but rather they argue that they are entitled to qualified immunity because it was not clearly established that the First Amendment protects statements such as those Williams cites as the basis for her removal and demotion.

"It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). The question that we must answer, however, is whether the contours of this right of a public employee to be free from adverse employment action on the basis of protected speech were sufficiently clear that a reasonable official would understand that demoting an employee on the basis of the speech Williams cites as the reason for her demotion would violate that right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Guercio v. Brody*, 911 F.2d 1179, 1184 (6th Cir. 1990) (stating that qualified immunity inquiry in public employee, free speech case is whether the rights "were so clear at the time in question that reasonable minds could not differ on the constitutionality of [the employee's] discharge"), *cert. denied*, 111 S. Ct. 1681

(1991); *Garvie v. Jackson*, 845 F.2d 647, 650 (6th Cir. 1988) ("we consider whether reasonably competent officials could have disagreed on whether and to what extent [the employee's] speech was protected by the first amendment").

The Supreme Court has developed a balancing test for determining if a public employee's free speech rights have been infringed.

> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

Rankin, 483 U.S. at 384 (parallel citations omitted). Thus, determining if defendants could rightfully take adverse employment action against Williams on the basis of her speech is a two-step process. The threshold inquiry is whether the speech that Williams cites as the basis for her removal and discharge "may be 'fairly characterized as constituting speech on a matter of public concern.'" *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). If so, then we must determine if Williams' interest in speaking freely is outweighed by the state's interest in promoting the efficiency of public services. *Id.* at 388.

Connick provides guidance for determining whether a public employee's speech constitutes speech on a matter of public concern. In *Connick*, an assistant district attorney, disgruntled over her pending transfer, distributed a questionnaire to her co-workers asking their opinions about several office policies. The Court stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. The Court held that the questions concerning confidence in supervisors, morale in the workplace, and the need for a grievance committee did not address matters of public concern, but rather were questions concerning internal office affairs and were designed for the plaintiff merely "to gather ammunition for another round of controversy with her superiors." *Id.* at 148. However, the Court found that the question asking if the employees "ever feel pressured to work in political campaigns on behalf of office supported candidates" did address a matter of public concern. *Id.* at 149.

Just as the question concerning political pressure in *Connick*, Williams' statements that were critical of political patronage employment practices and her statements and reports that she suspected state employees were engaging in political activities at the DES office addressed matters of public concern. As the Supreme Court stated in *Connick*, "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." *Id.* at 149. Furthermore, we have held that "[p]ublic interest is near its zenith when ensuring that public organizations are being operated in accordance with the law." *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (per curiam); *see also Solomon v. Royal Oak Township*, 842 F.2d 862, 865 (6th Cir. 1988) (stating that speech disclosing public corruption is a matter of public interest). Therefore, the Supreme Court opinion in *Connick* and opinions of this court clearly establish that Williams' statements about political patronage practices and her statements and reports about employees using their positions for partisan political activities constituted speech on matters of public concern.

Defendants' argument that our decision in *Thomson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2341 (1993), requires a different conclusion is mistaken. In that case, the plaintiff was a fraud investigator for the state. He had conversations with his supervisors concerning one of his fraud investigations, in which they

discussed the confidentiality policies and proper procedures for bringing charges. We concluded that these conversations concerned plaintiff's duties as an employee, and therefore "these conversations concern[ed] matters of internal department policy and cannot be considered speaking out on matters of public concern." *Id.* at 1021. Discussions about office policy and job duties as in *Thomson* may address matters of only private concern, but criticizing political patronage practices and reporting allegedly politically corrupt activities of employees, as Williams did, addresses matters of great public concern.

Defendants also argue that Williams lacked any factual basis for her statements about political patronage practices and corruption in the Winchester DES office. We have noted that the *Pickering* Court "declined to extend protection to false statements that are knowingly or recklessly made." *Gossman v. Allen*, 950 F.2d 338, 342 (6th Cir. 1991) (citing *Pickering*, 391 U.S. at 574). And for purposes of determining if public officials are entitled to qualified immunity, this means that "[i]f an official reasonably believes that an employee made statements with knowledge of, or reckless indifference to, their falsity, the official would conclude that the employee could be fired without offending the First Amendment," and therefore be entitled to qualified immunity. *Gossman*, 950 F.2d at 342.

In *Gossman*, a public employee had openly criticized her superiors in various forums, including a hearing on the environmental impact of a proposed airport expansion and a federal enforcement action against a local waste water treatment plant. She also wrote newspaper articles alleging corruption in her department. We noted several material inconsistencies between the inspector's public statements and her deposition in the lawsuit. Based on these inconsistencies, we determined that "a reasonable official could believe that [the employee] had knowingly or recklessly made false statements to the media and to the court," and therefore qualified immunity for the defendants was appropriate. *Id.* at 343.

The first point we note about defendants' argument is that it does not address Williams' statements that were critical of political patronage employment practices in general. These stated opinions cannot be considered false statements at this juncture. As to Williams' statements and reports about specific politically corrupt activities by employees at the Winchester DES office, defendants point to no proof in the record that Williams' comments were false statements. Unlike

Gossman, where there were material inconsistencies between the employee's public statements and her deposition testimony, effectively admitting that important parts of her public statements were false, defendants here point to nothing in the record that contradicts Williams' statements and reports. Therefore, there is nothing from which we could infer that a reasonable official could have believed that Williams' statements were false statements knowingly or recklessly made.[3]

Having concluded that Williams' speech about political patronage and other corrupt activities involved matters of public concern, we turn to the second step in determining whether defendants could rightfully remove and demote Williams for this speech, i.e., whether Williams' interest is outweighed by the state's interest in promoting the efficiency of public services. Specifically, in the qualified immunity context, we must decide whether defendants reasonably could have believed that the harm to the office's efficiency outweighed Williams' interest in speaking freely. *Gossman*, 950 F.2d at 343 n.2. In striking the balance, courts should consider whether an employee's comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees. *E.g.*, *Rankin*, 483 U.S. at 388 (citing *Pickering*, 391 U.S. at 570-73); *Stern v. Shouldice*, 706 F.2d 742, 748 (6th Cir.), *cert. denied*, 464 U.S. 993 (1983).

In a rather conclusory fashion, defendants contend that a reasonable official could have believed that the state's interests outweighed Williams' interest in speaking on matters of public concern. They state:

> Williams' pattern of verbal abuse of co-workers [and other misconduct] undermined the authority of her superiors,

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[3] Williams did admit that she "couldn't prove anything about selling jobs for any worker" and that she had heard rumors about hose activities for twenty years. J.A. 467. However, this does not contradict her statements that she suspected certain employees were selling jobs. Furthermore, it does not show, or even indicate, that those employees were not selling jobs. All Williams' admission shows is that she may not have had a substantial basis for making her statements that certain employees were selling jobs. This would be relevant only if her statements were actually false. On this important point, defendants have made no showing.

> destroyed harmony and impaired working relationships within the office and interfered with the mission of the office and Williams' performance of her duties. Since Williams' departure, the efficiency of the Winchester office, the office's relationship with the community and the morale and teamwork of the office staff have all improved significantly. Williams' "right" to engage in unsubstantiated rumor mongering can hardly be sufficient under [the balancing test] to outweigh the clear damage her verbal abuse caused to the Winchester DES office.

Brief for Defendants-Appellants at 32; *see also* Reply Brief of Defendants-Appellants at 16. The problem with this argument, besides being conclusory, is that it does not address what state interest were damaged by the speech for which Williams claims she was removed and demoted. Instead, defendants' argument focuses on the harms done by Williams' alleged mismanagement and verbal abuse of co-workers. In assessing whether certain speech should be protected under the balancing test of *Pickering* and its progeny, the focus is on the disruption resulting from the speech itself, not other events. *See Solomon v. Royal Oak Township*, 842 F.2d 862, 866 (6th Cir. 1988).

As to Williams' statements criticizing the political patronage hiring and promoting practices, no reasonable official could have believed that the state's interest in efficient operations outweighed Williams' interest in commenting on these matters. There is no indication that Williams' expression of her opinion on these matters of public concern undermined working relationships in the office, interfered with her duties, or impaired discipline. As to Williams' statements and reports about specific instances of political patronage and politically corrupt practices in the office, there is one countervailing state interest. These statements and reports did have the effect of creating disharmony between Williams and the employees she reported, Gibson and Little. However, no reasonable official could conclude that this interest outweighed Williams' interest in reporting these instances of political misconduct. As we have stated, "when an employee exposes unscrupulous behavior in the workplace, his interests are co-extensive with those of his employer; both want the organization to function in a proper manner." *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986).

Defendants argue that because particularized balancing is necessary under *Pickering* and its progeny, they are entitled to qualified immunity because the contours of a public employee's free speech rights are unclear. *See Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986). Defendants also cite our statement in *Meyers v. City of Cincinnati*, 934 F.2d 726, 729 (6th Cir. 1991), referring to the *Pickering* balance test as a "somewhat imprecise standard." We agree that in many public employee free speech cases it would be unclear to a reasonable official what the outcome of the balancing inquiry should be. However, the instant case presents a situation where the employee has spoken out on matters of great public concern, and these statements apparently had only minimal effect on the efficiency of the office. In other words, this is not a case where the imprecision of the standard makes a difference.

Thus, we conclude that the contours of the public employee's right to be free from adverse employment action on the basis of protected speech were sufficiently clear in May 1990 and May 1991 (the time of Williams' removal and demotion) that a reasonable official would understand that taking such action on the basis of statements that were critical of political patronage employment practices and statements that she suspected that state employees were engaging in political patronage and other politically corrupt activities would violate that right. *Connick* made it clear in 1983 that such statements addressed matters of public concern. The only countervailing state interest is the disruption of the working relationship between Williams and two employees, and no reasonable official, in light of opinions of this court and others, could conclude that this interest outweighed Williams' interest in speaking freely on matters of political patronage and political corruption. Therefore, defendants are not entitled to summary judgment on Williams' First Amendment, § 1983 claim based on qualified immunity.

(2)

We now turn to the issue of whether, at the time she was demoted, Williams had a clearly established right to predemotion notice and hearing such that reasonable officials would know that not affording her notice and hearing before her demotion violated her rights under the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment prohibits states from depriving individuals of life, liberty, or property without due process of law. Thus, as an initial

matter, we must determine if Williams had a protected property interest in her position of Field Office Manager. "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). In order to create a property interest in a benefit, these "existing rules or understandings" must give the recipient "a legitimate claim of entitlement to" the benefit. *Roth*, 408 U.S. at 577. Statutes providing that state employees cannot be discharged or demoted without cause clearly give the employee a protected property interest in continued employment. *See Loudermill*, 470 U.S. at 538-39.

The Kentucky statutory scheme creates a property interest in continued employment for employees such as Williams. A Kentucky statute provides that "[a] classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause." Ky. Rev. Stat. Ann. § 18A.095(1). Williams was in the classified service and she had "status."[4] Therefore, Williams could not be demoted without cause, and accordingly she had a protected property interest in her job as Field Office Manager. The Kentucky statutory scheme is clear, and the Supreme Court cases decided before Williams' demotion are clear that such statutes create property interests protected by the Fourteenth Amendment. Thus, a reasonable official could not have concluded that Williams did not have a protected property interest in her job.

Because Williams had a property interest in her job, she could not be deprived of this interest without due process. The Kentucky statutory scheme requires that an employee such as Williams be given notice and hearing before being discharged. However, when an employee such as Williams is demoted, the Kentucky statutes only require that the employee be given notice of the demotion; no hearing is required before the demotion. *See* Ky. Rev. Stat. Ann. §§ 18A.095. The eighteen-page letter delivered to Williams on May 30, 1991, satisfies the Kentucky statutory notice requirement. Thus, the question becomes whether it was clearly established at the time of

[4] "'Status' means the acquisition of tenure with all rights and privileges granted by the provisions of this chapter after satisfactory completion of the initial probationary period by an employee in the classified service." Ky. Rev. Stat. Ann. § 18A.005(31).

Williams' demotion that her federal right to due process included the right to more process than was accorded by Kentucky law; namely, notice of a pending decision to demote her and a hearing before being demoted.

The most closely analogous Supreme Court case, and the case on which the district court relied, is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, two school employees were terminated without being given any opportunity to respond before their terminations. The Court first determined that these public employees had a protected property interest in continued employment because a state statute provided that they could not be terminated without just cause. The Court then turned to considering what process was due. The Court stated that it had "described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Id.* at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original)). The Court then held that it was well settled that "[t]his principle requires 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected interest in his employment." *Id.* at 542 (citing *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972), and *Perry v. Sinderman*, 408 U.S. 593, 599 (1972)). The Court then supported this rule by balancing the competing interests.

> The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in retaining employment, the governmental interests in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination.
>
> First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.
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> . . . .
>
> The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

Id. at 542-546 (footnotes and citations omitted). However, the Court determined that although these considerations require some type of pretermination hearing, the hearing itself, at least where there are extensive post-termination procedures, need not be formal or elaborate and that it is enough if the tenured public employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

Although *Loudermill* dealt with a termination of a public employee as opposed to a demotion of a public employee, as is presented by this case, Williams argues that "[t]he *Loudermill* Court made clear that neither the principle involved not its ruling in that case were

restricted to employment discharge cases, and, in fact, that both applied to deprivations of '*any significant property interest*' created by the state." Brief for Plaintiff-Appellee at 13. On the other hand, defendants argue that *Loudermill* cannot be mechanically applied to demotion cases because the balancing of interests performed by the Court was dependent on facts peculiar to termination of employment rather than mere demotion. Because the process due varies with the quality and extent of the deprivation of a property right, defendants conclude that *Loudermill* did not clearly establish that Williams had a right to notice and hearing before her demotion.

We agree with defendants that *Loudermill* cannot be mechanically applied to demotion cases. "Not every deprivation of liberty or property requires a predeprivation hearing or a federal remedy." *Ramsey v. Board of Educ.*, 844 F.2d 1268, 1272 (6th Cir. 1988). In fact, the *Loudermill* Court noted that "[t]here are, of course, some situations in which a post deprivation hearing will satisfy due process requirements." *Loudermill*, 470 U.S. at 542 n.7 (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) and *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908)). Because determining what process is due in a given case involves the balancing of several interests, including the nature of the property interest involved, we cannot say that a reasonable public official should have known from the *Loudermill* case that its requirement of notice and hearing prior to termination of employment applied with equal force to a demotion. Therefore, we must determine if opinions of this court or others, as explained above, clearly establish that the *Loudermill* predeprivation requirements apply to demotions.

Williams points to two Sixth Circuit decisions in which, Williams argues; we "expressly or impliedly held *Loudermill* applicable to an employee's demotion." Brief for Plaintiff-Appellee at 14 n.6. In *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461 (6th Cir. 1988), *cert. denied*, 493 U.S. 820 (1989), a prison guard was demoted from sergeant to corrections officer. She filed an action alleging, among other things, that defendants "failed to provide her with a predeprivation hearing before her termination, as mandated by . . . *Loudermill*." *Id.* at 467. We noted that the plaintiff's supervisor had met with plaintiff two days before her demotion and discussed the forthcoming demotion for 30 minutes. During this discussion, the supervisor advised the plaintiff of the pending decision to demote her, explained the reasons for her demotion, and provided her an opportu-

nity to respond to his statements. Without discussing the applicability of *Loudermill* to demotion cases, we stated that "[t]his encounter satisfied the requirements of a pre-deprivation hearing mandated by *Loudermill*" and held that "[p]laintiff's suggestion that she was not properly accorded her pre-deprivation due process rights is in error." *Id.* at 468.

We treated the issue similarly in *Hawks v. City of Pontiac*, 874 F.2d 347 (6th Cir. 1989). In that case, a police officer was demoted from lieutenant to sergeant because he broke a residency requirement. The collective bargaining agreement under which the Plaintiff's employment was governed suggested that a violation of the residency requirement would be grounds for discharge. The plaintiff, his union representative, and the chief of police attended a pretermination conference, after which the chief notified the plaintiff of his decision to demote him. The plaintiff filed an action claiming that his procedural due process rights were violated. We noted that the Supreme Court in *Loudermill* had held that an employee with a property interest should receive notice and hearing before termination, and it was conceded that the officer had a property interest in his job. However, we held that the plaintiff's meeting with the chief of police at which he presented evidence "met the *Loudermill* pretermination hearing requirement." *Id.* at 350.

Hawks and *Sewell* can be read in several different ways. First, they can be read to mean that an employee with a property interest in his employment cannot be demoted without first being given a predemotion hearing. Both cases applied the *Loudermill* predeprivation hearing requirement to a situation where the employee had only been demoted. Second, they can be read to mean that being removed from a higher employment position and placed in a lower employment position (i.e., a demotion) is equivalent to a termination from the higher employment position, and therefore the *Loudermill* pretermination requirements were applicable. Both cases spoke of the demotion as if it were a termination. The *Sewell* Court summarized the plaintiff's claim by stating that defendants "failed to provide her with a pre-deprivation hearing before her *termination*," even though the plaintiff had not been discharged but rather demoted. *Sewell*, 863 F.2d at 467 (emphasis added). The *Hawks* court's holding was based on its finding that "the *Loudermill* pre*termination* hearing requirement" had been met. *Hawks*, 874 F.2d at 350 (emphasis added). However, the third and most plausible reading of those cases is that the

courts did not decide whether *Loudermill* applied to demotions because even under the standards for termination cases set out in *Loudermill*, the plaintiffs did not have viable procedural due process claims. Neither case affirmatively states that employees with property interests in their jobs must be given notice and hearing before being demoted. Rather, both merely state the rule of *Loudermill* and determine that that rule was complied with in those cases. Therefore, *Hawks* and *Sewell* do not demonstrate that Williams had a clearly established right to notice and hearing before her demotion.[5]

Williams does not point to any other cases establishing such a right. The First and Fifth Circuits have indicated in dicta without discussion that they would apply *Loudermill* to demotions. *See Mangaroo v. Nelson*, 864 F.2d 1202, 1206 (5th Cir. 1989) ("The defendants do not, and indeed reasonably cannot, challenge the district court's finding that, because she was demoted without prior hearing, Mangaroo was denied due process.") (citing *Loudermill*, 470 U.S. at 542); *Rivera-Ruiz v. Gonzalez-Rivera*, 983 F.2d 332, 334-35 (1st Cir. 1993). Two published opinions of district courts from other circuits have balanced the competing interest and found that a tenured public employee is entitled to a *Loudermill* hearing before being demoted. *See Williams v. City of Seattle*, 607 F. Supp. 714, 720-21 (W.D. Wash. 1985); *DelSignore v. DiCenzo*, 767 F. Supp. 423, 427-

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[5] In an unpublished opinion affirming "upon the opinion of the district court," we considered the applicability of *Loudermill* to fact situations other than termination of employment. *Germano v. City of Mayfield Heights*, 833 F.2d 1012, 1987 WL 38885 (6th Cir. 1987) (unpublished), *aff'g*, 648 F. Supp. 984 (N.D. Ohio 1986). In that case, the plaintiff had been deprived of sixteen days of sick leave, valued at $1,768, and a $166.60 clothing allowance without an opportunity to respond before the deprivation. The district court held that for the *Loudermill* predeprivation notice and hearing requirements to attach "there must be a significant property interest at stake." 648 F. Supp. at 985.

> Whether a property interest is "significant" or "insignificant" will have to be decided by the courts on a case-by-case basis. Under the facts in the present case, this Court holds that the alleged property interests involved—sick leave and the clothing allowance of a police officer—are not of such a significant nature that a predeprivation proceeding is required. Postdeprivation proceedings satisfy due process in this case.

Id. at 986. This case-by-case inquiry further counsels that the right of predeprivation hearing before a demotion was not clearly established in the Sixth Circuit at the time of Williams' demotion. There is no Sixth Circuit case holding that the property interest involved in demotions is significant.

28 (D.R.I. 1991). Therefore, the only authorities that clearly recognize a right to predemotion notice and hearing are the two district court opinions from Washington and Rhode Island. These decisions are not "so clearly foreshadowed by" *Loudermill* or opinions in this circuit" as to leave no doubt in the mind of a reasonable officer that" not giving a tenured employee notice and hearing before a demotion would violate the employee's due process rights. *See Seiter*, 858 F.2d at 1177.

Although *Loudermill*'s analysis should be applied to determine if Williams was entitled to a predeprivation hearing, it is not yet clear how this analysis would come out in the demotion setting as opposed to the discharge setting. *Loudermill* recognized that there are some property interest for which a post deprivation hearing will satisfy due process, but by balancing the competing interests the Court found that a predeprivation hearing must be provided before a tenured public employee is discharged. In a demotion case the balance of competing interests may not compel a different result. Of course, a plausible argument can be made that our interpretation of *Loudermill* in *Hawks* and *Sewell* establishes a right to a predemotion hearing. However, the ambiguity of both of those cases on this issue would leave it unclear to a reasonable official whether a predemotion hearing is required by the Constitution or rather just happened to take place in those cases. When an official would have to guess at a case's meaning on a certain issue, that case does not clearly establish anything about that issue. Thus, we cannot say that the unlawfulness of not providing a predemotion hearing would have been apparent to a reasonable official at the time Williams was demoted.

"The doctrine of qualified immunity recognizes that government officials need to be able to carry out their duties without fear of harassing litigation and that they can do so 'only if they reasonably can anticipate when their conduct may give rise to liability for damages....'" *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Here, defendants could not reasonably anticipate that their following the requirements of the Kentucky statute and thereby failing to provide a predemotion hearing to Williams would give rise to liability for damages. Therefore, defendants are entitled to qualified immunity on Williams' procedural due process claim.

B.

Defendants challenge the district court's grant of partial summary judgment to Williams on the merits of her procedural due process claim. This challenge is not mooted by our determination that defendants are entitled to qualified immunity on the procedural due process claim because qualified immunity only immunizes defendants from monetary damages, and Williams has also asked for injunctive relief against defendants in their official capacities.

We must first determine whether we have jurisdiction over the appeal of this issue. The courts of appeals have jurisdiction only when an appeal is taken from a "final decision" of the district court, 28 U.S.C. § 1291, or from and interlocutory order appealable under 28 U.S.C. § 1292. *See, e.g., Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431 (1956); *Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc.*, 807 F.2d 1279, 1282 (6th Cir. 1986). This appeal does not involve an order appealable under 28 U.S.C. § 1292. Therefore, we must determine if the district court's grant of partial summary judgment to Williams was a "final decision" under 28 U.S.C. § 1291.

Federal Rule of Civil Procedure 54(b) provides a means in multiple-party or multiple-claim actions, such as this case, by which appeals may be taken from final decisions on individual claims without waiting for final decisions on the rest of the claims. However, Rule 54(b) "does not relax the finality required of each decision, as an individual claim, to render it appealable." *Mackey*, 351 U.S. at 435. In order to be certifiable under Rule 54(b), the decision on the individual claim must be "final" within the meaning of 28 U.S.C. § 1291. *Id.* at 435, 437; *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 583 n.21 (1980); *Rudd Constr. Equip. Co. v. Home Ins. Co.*, 711 F.2d 54, 56 (6th Cir. 1983) (per curiam); *Corrosioneering*, 807 F.2d at 1282.

Pursuant to Rule 54(b), the district court certified that there was no just reason for delay and that its judgment on the due process claim was final and appealable. However, this partial summary judgment only addressed the question of whether defendants violated Williams' procedural due process rights; it did not dispose of the issue of what relief was warranted for this violation. A decision is not "final" within the meaning of 28 U.S.C. § 1291 where the awarding of relief remains to be resolved. *E.g. Wetzel*, 424 U.S. at 744. Because the district court's grant of partial summary judgment left the awarding of relief

to be resolved, it was not a "final decision" within the meaning of 28 U.S.C. § 1291, and therefore it was not certifiable under Rule 54(b). *See Rudd Constr.*, 711 F.2d at 56. Thus, the district court's certification of the partial summary judgment as final and appealable under Rule 54(b) does not provide this court with jurisdiction over defendants' appeal of the partial summary judgment.

Defendants argue that because the merits of the procedural due process issue are intertwined with the qualified immunity issue, we should exercise "pendent appellate jurisdiction" over the grant of partial summary judgment on the due process claim. *See Brown v. Grabowski*, 922 F.2d 1097, 1106 n.3 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2827 (1991); *Drake v. Scott*, 812 F.2d 395, 399 (8th Cir.), *adhered to*, 823 F.2d 239 (8th Cir.) (en banc), *cert denied*, 484 U.S. 965 (1987). The Sixth Circuit has not adopted by name the "pendent appellate jurisdiction" doctrine. In fact, we have held that only the qualified immunity issue is immediately appealable. *See Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1094 (6th Cir. 1992). Nevertheless, "pendent appellate jurisdiction" would be inappropriate in this case because the grant of summary judgment is not inextricably intertwined with the qualified immunity issue. We have resolved the qualified immunity issue without addressing whether there was actually a due process violation. We merely held that Williams could not recover monetary damages against defendants in their individual capacities because it was not clearly established at the time of Williams' demotion that failing to provide a predemotion notice and hearing would violate Williams' due process rights. In this case, our holding on qualified immunity has nothing to do with the merits of the due process claim. Furthermore, "pendent appellate jurisdiction" is a discretionary doctrine. This case presents uncertainties as to the actual holding of the district court. It is unclear whether the district court ever considered defendants' "new evidence" (i.e., the tape recording of the conversation on the day Williams was demoted), which they claim demonstrates that Williams was given a *Loudermill* hearing. By declining to exercise jurisdiction over this issue, we will allow the district court to decide in the first instance whether that conversation makes a difference in its analysis. Therefore, we will not exercise jurisdiction over this nonfinal order.

C.

The district court held that claims for prospective injunctive and declaratory relief against the defendants in their official capacities were not barred by the Eleventh Amendment. The district court found that the declaratory and injunctive relief Williams requested in her § 1983 claims, namely, reinstatement and expungement of all references to her demotion from her records, was prospective in nature, and therefore her § 1983 action against the state officials in their official capacities was not completely barred by the Eleventh Amendment (i.e., the § 1983 claims for injunctive and declaratory relief against defendants in their official capacities were not barred by the Eleventh Amendment). Defendants challenge this holding and also argue that the Eleventh Amendment bars Williams' state claims. The district court's determination that defendants were not entitled to Eleventh Amendment immunity is immediately appealable as a "final judgment" under the collateral order doctrine, and we therefore have jurisdiction over these Eleventh Amendment issues. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993). Because the question of whether Eleventh Amendment immunity applies is a question of law, we review the district court's determination on this issue de novo. *Allen v. Purkett*, 5 F.3d 1151, 1153 (8th Cir. 1993) (per curiam).

Defendants rely on *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), to argue that Williams' claims for injunctive and declaratory relief against them in their official capacities are barred by the Eleventh Amendment. In *Pennhurst*, the Supreme Court held that the Eleventh Amendment forbids federal courts from enjoining state institutions and state officials on the basis of state law and that the doctrine of pendent jurisdiction does not override the Eleventh Amendment. *Id.* at 121.

Following *Pennhurst*, we hold that the Eleventh Amendment bars Williams' state law claims insofar as they seek injunctive relief. However, neither the Eleventh Amendment nor Pennhurst deprives federal courts of jurisdiction over state law claims for damages against state officials sued in their individual capacities. *Pena v. Gardner*, 976 F.2d 469, 473-74 (9th Cir. 1992) (per curiam); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1271 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1644 (1993); *Stephens v. American Home Assurance Co.*, 811 F.Supp. 937, 961-62 (S.D.N.Y. 1993). Accordingly, Williams' state law claims for injunctive relief shall be dismissed, but her state

law claims for damages against the defendants in their individual capacities will not be dismissed.

Defendants also argue that the Eleventh Amendment bars Williams' due process and free speech claims for prospective injunctive relief because the protected property interest must be derived from state law, and therefore the claim is based on state law and barred by the Eleventh Amendment under *Pennhurst*. Defendants are correct that property interests protected by due process are not created by the Constitution but rather by "existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). However, the fact that we must analyze state law to determine if Williams has a property right in her job does not turn her constitutional claim into a state claim barred by *Pennhurst*. *See Spruytte v. Walters*, 753 F.2d 498, 514 (6th Cir.), *cert. denied*, 474 U.S. 1054 (1985); *Cassidy v. Adams*, 872 F.2d 729, 732 (6th Cir. 1989). Determining if Williams has a property interest in her job is merely a prerequisite to resolution of the substantive constitutional question of whether Williams was deprived of due process. Williams' action under 42 U.S.C. § 1983 for the violation of her due process and free speech rights guaranteed by the Fourteenth and First Amendments to the United States Constitution cannot be characterized as an action based on state law. The Eleventh Amendment does not bar § 1983 actions brought against state officials in their official capacities seeking prospective injunctive relief. *E.g., Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992) (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). Therefore, Williams' § 1983 claims against the defendants in their official capacities for declaratory and prospective injunctive relief will not be dismissed.

III.

Defendants are not entitled to qualified immunity on Williams' First Amendment claim. It was clearly established that the speech Williams cites as the reason for her demotion addressed matters of public concern. Furthermore, no reasonable official could believe that Williams' interest in speaking freely on these matters of public concern was outweighed by the state's interest in preventing conflicts between Williams and the employees allegedly involved in the political corruption. Accordingly, the district court's denial of defendants' motion for summary judgment on the First Amendment § 1983

claim on the basis of qualified immunity is AFFIRMED. However, we express no view as to the eventual outcome of Williams' First Amendment claim.

Defendants are entitled to qualified immunity on Williams' procedural due process claim because it was not clearly established at the time of her demotion that a tenured public employee had a due process right to a predemotion hearing. Accordingly, the district court's denial of defendants' motion for summary judgment on Williams' procedural due process § 1983 claim based on qualified immunity is REVERSED. Williams cannot pursue her due process claim for money damages against defendants in their individual capacities.

We have no jurisdiction over defendants' appeal of the district court's grant of partial summary judgment to Williams on the merits of her procedural due process claim because the grant of partial summary judgment was not a "final decision." Accordingly, defendants' appeal of the district court's grant of partial summary judgment is DISMISSED.

As to defendants' challenge to the district court's Eleventh Amendment rulings, we hold that the state law claims insofar as they seek injunctive relief are barred by the Eleventh Amendment under *Pennhurst* and are therefore DISMISSED. However, the Eleventh Amendment does not bar Williams' § 1983 claims for declaratory and prospective injunctive relief against defendants in their official capacities, and accordingly, those claims are not dismissed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 93-5222/93-5656

MAGGIE WILLIAMS, *Plaintiff – Appellee,*	)	
v.	)	**JUDGMENT**
COMMONWEALTH OF KENTUCKY; CABINET FOR HUMAN RESOURCES; JOHN HODGKIN; RONALD HOLLAND; FRANK J. WILLEY; LYNNE MCWILLIAMS; P. KENNETH COX; MARGARET WHITTET; DARVIN ALLEN, *Defendants – Appellants*	)	

Decided and Filed May 26, 1994

BEFORE: Milburn and Guy, Circuit Judges; and Timbers, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the district court's denial of defendants' motion for summary judgment on the First Amendment § 1983 claim on the basis of qualified immunity is AFFIRMED. The district court's denial of defendants' motion for summary judgment on Williams' procedural due process § 1983 claim based on qualified immunity is REVERSED. The

defendants' appeal of the district court's grant of partial summary judgment is DISMISSED. The plaintiff's state law claims seeking injunctive relief are barred by the Eleventh Amendment and are therefore DISMISSED.

COSTS of this appeal are taxed equally between the parties.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

A True Copy.

Attest:

/s/ Diane Schnur
Deputy Clerk

Issued as Mandate: 6/20/94
Costs: No Costs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-193

MAGGIE WILLIAMS,
Plaintiff

V. MEMORANDUM OPINION

COMMONWEALTH OF
KENTUCKY, ET AL.,
Defendants

Entered and Filed January 22, 1993

I. Introduction

Plaintiff, Maggie Williams, is a tenured employee of the Commonwealth of Kentucky. She has been employed by the state for more than twenty-five (25) years in the areas of employment and social services by the Cabinet for Human Resources ("CHR"), Department for Employment Services ("DES"), Division for Field Services ("DFS"). From February 1985 until May 3, 1990, Plaintiff was the manager of the DES office in Winchester, Kentucky, and its satellite office in Richmond, Kentucky, wherein she supervised approximately thirty (30) employees. These "unemployment offices" administer state and federally funded unemployment insurance and employment services programs for the Commonwealth of Kentucky.

Plaintiff brings this action under 42 U.S.C. § 1983, alleging that the Defendants violated her constitutional rights under the First and Fourteenth Amendments in May 1990 and May 1991, when in the absence of advance notice or a hearing, she was removed from her

position as Field Office Manager of the Winchester DES office and temporarily assigned to work as an interviewer in the Georgetown DES office. Plaintiff states that this reassignment was accompanied by the revocation of her executive supervisory status and a reduction in salary, from a pay grade 13 down to a pay grade 8. Thereafter, Plaintiff alleges that on May 30, 1991, she was restored to her position as Field Office Manager of the Winchester DES office, and on the same day, without advance notice or hearing, (1) she was demoted to the position of Senior Unemployment Insurance Examiner, (2) her pay grade was reduced from a pay grade 14 to a pay grade 9, resulting in a salary reduction of approximately $319.00 per month, and (3) she was reassigned to the DES office in Lexington, Kentucky. Plaintiff also has pendent state claims for wrongful discharge and for violations of KRS 61.102 and 18A.095.

Plaintiff seeks (1) to be restored to her position as Field Office Manager of the Winchester DES office, with the accompanying pay grade and salary for that position, plus all increases and other employment benefits that she would have received in this position between May 3, 1990, and the date of judgment, and (2) the expungement of all references to her reprimand and demotion from her personnel record. Plaintiff also seeks compensatory and punitive damages, plus attorney's fees.

This matter is before the court on the Defendants' motion for summary judgment and the Plaintiff's motion for partial summary judgment on her due process claim. These motions having been fully briefed, they are ripe for consideration.

II. Factual Background

A review of Plaintiff's Fourth Restated and Verified Complaint, Plaintiff's deposition, and Plaintiff's affidavit filed in support of her motion for partial summary judgment indicate that Plaintiff believes the problems she experienced with her supervisors, which resulted in a demotion and a reassignment to the DES office in Lexington, began in November 1988, when she attended a meeting of DES office managers in Louisville, Kentucky. Plaintiff states that at this meeting, Donald G. Dixon told the managers that they were expected to employ the "Governor's people" for positions under their supervision, that they would be given names to be selected from the merit registers, and that failure to cooperate would result in "serious consequences." (*See Affidavit of Maggie Williams*, Aug. 10, 1992, p. 2 - Docket Entry

#118). Plaintiff thought that this alleged plan to hire the "Governor's people" violated the state merit system laws, and she made her position on this matter clear to her supervisors. Additionally, she informed the employees under her supervision that she would not facilitate political employees in obtaining merit positions. *Id.*

Subsequently, Plaintiff states that in February 1989, Defendants Cox, Whittet, and Willey caused the state to hire a political appointee, Franklin L. Gibson as an unclassified "federally funded time limited" employee for a six-month probationary period in the Richmond DES office; thus, he was placed under Plaintiff's supervision. Gibson's job was to recruit applicants to the federal Job Corps program. During Gibson's six-month probationary period, Plaintiff came to believe that Gibson was engaging in political patronage activity on his job and was using the DES office telephones to conduct his private business during normal work hours and after working hours. Plaintiff also knew that Gibson failed to account either to his immediate supervisor or to her for his work time and travel activities and that Gibson had submitted a falsified travel voucher. Consequently, in June 1989, Plaintiff recommended to Defendants Cox, Whittet, and Willey that Gibson not be retained as an employee after his probationary period ended due to his political activities on the job. Defendants Cox, Whittet, and Willey declined to follow Plaintiff's recommendation; Gibson was not terminated.

Thereafter, Plaintiff alleges that Defendant Cox, the DES Director, attempted to force her to change her unfavorable recommendation concerning Gibson and that upon her refusal to comply with his request, he gave her an adverse job performance rating. Subsequently, an administrative review hearing was held in August 1989, at the recommendation of Defendants Cox and Whittet, to determine whether Plaintiff's employment should be terminated. Plaintiff states that Defendant Cox prosecuted this hearing and called Gibson as a witness against her. As a result of that hearing, Plaintiff alleges that Defendants Cox, Whittet, Allen and Willey caused a formal reprimand to be entered in her personnel record.

Following on the heels of the reprimand, Plaintiff states that in October 1989, Defendant Allen instituted and Defendant Holland conducted an investigation of her management of the Winchester DES office and that during the course of this investigation, Defendants Allen, Whittet, Holland and Hodgkin encouraged her employees to file formal grievances and write letters to them concerning their

complaints about Plaintiff's management practices. As a result of this investigation, on November 15, 1989, Commissioner Darvin Allen issued a memorandum to all employees of the Winchester DES office directing them to refrain from making derogatory comments concerning claimants, clients, job seekers, employer representatives or other members of the public, as well as coworkers, subordinates, or supervisors. (*See* Exhibit 3 to *Plaintiff's Motion for Partial Summary Judgment* – Docket Entry #115). Plaintiff believes this memorandum was issued to infringe on her constitutional right to speak freely about what she perceived to be illegal activity; however, regardless of this memorandum, Plaintiff continued to report to her supervisors actions by two of her employees, Franklin Gibson and James B. Little, that she perceived to be politically motivated.

Subsequently, on April 6, 1990, Plaintiff reprimanded Little for engaging in partisan political activities on the job. In response, Little filed a formal grievance with Defendant Hodgkin, objecting to the reprimand and requesting an investigation of Plaintiff's management of the Winchester DES office. Thereafter, on April 26, 1990, Commissioner Darvin Allen requested the CHR Office of Inspector General to conduct another investigation of the management of the Winchester DES office. One week later, on May 3, 1990, without advance notice or hearing, Plaintiff was removed as manager of the Winchester DES office and temporarily reassigned to work as an interviewer in the Georgetown DES office. Thereafter, on May 30, 1991, she was temporarily restored to her position as Field Office Manager of the Winchester DES office, and on the same day, without advance notice or hearing, (1) she was demoted to the position of Senior Unemployment Insurance Examiner, (2) her pay grade was reduced from a pay grade 14 to a pay grade 9, resulting in a salary reduction of approximately $319.00 per month, and (3) she was reassigned to the DES office in Lexington, Kentucky. Thus, Plaintiff never regained her position as manager of the Winchester DES office.

Plaintiff alleges that the adverse personnel action taken against her was done in retaliation for her refusal to participate in hiring practices that she believed to be illegal and for her open criticism of the alleged political patronage activities, including her unfavorable recommendation of Franklin Gibson and her reprimand of James B. Little.

III. The Motions For Summary Judgment

Plaintiff has moved for partial summary judgment on her due process claim on the grounds that as a tenured employee of the Commonwealth of Kentucky, she was deprived of the property interests attendant to her position as manager of the Winchester DES office, without advance notice and a hearing prior to her removal from this managerial position and demotion to a nonmanagerial position with a reduced salary.

Relying on the defenses of sovereign immunity under the Eleventh Amendment and qualified immunity, the Defendants have moved for summary judgment on all federal claims. Further, regarding the due process claim, the Defendants contend that there was no due process violation as Plaintiff's employment was not terminated, but merely demoted, she was not entitled to advance notice or a hearing. Concerning the First Amendment claim, the Defendants contend that they are entitled to summary judgment because the Constitution does not protect whistleblowers. With the resolution of Plaintiff's federal claims in the Defendants' favor, they assert that Plaintiff's pendent state claims should likewise be dismissed in the absence of a federal claim.

A. Standard for Summary Judgment

The Federal Rules of Civil Procedure state that a party is entitled to a summary judgment, upon motion, if "there is no genuine issue of material fact and . . . the moving party is entitled to a summary judgment as a matter of law." Fed.R.Civ.P.56(c). Where a motion for summary judgment is supported by the moving party, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed.R.Civ.P. 56(e).

> The United States Supreme Court has noted that Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The summary

judgment standard "mirrors" the directed verdict standard of Rule 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

A party must support its motion for summary judgment by directing the court to "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate the absence of a genuine issue as to a material fact. Fed.R.Civ.P.56(c). However, the moving party does not need to support its motion by "*negating* the opponent's claim." *Celotex*, 477 U.S. at 323 (emphasis in original). Although the moving party has the burden of showing conclusively that no genuine issue of material fact exists, all facts and inferences must be viewed in a light most favorable to the nonmoving party.

Moreover, a nonmoving party must rely on more than its pleadings to counter a supported motion for summary judgment:

> In cases . . . where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on "the pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the" "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."
>
> We do not mean that a nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

Celotex, 477 U.S. at 324.

Celotex affirms that "nonmoving parties must fulfill their burden of production" once the moving party has met its burden of produc-

tion. "The Supreme Court—Leading Cases," 100 Harv. L.R. 100, 252 (1986). Once the moving party has met its burden of production, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S. 574, 586 (1986). Where the nonmoving party fails to meet its burden, federal courts are prompted to grant summary judgment motions more often. 100 Harv. L.R. at 252. More importantly, "[t]he trial court has at least some discretion to determine whether the respondent's claim is 'implausible,'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1480 & n.21 (6th Cir. 1989), and complex cases or ones involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

Finally, a nonmoving party cannot merely rely on an allegation that a jury may not believe the moving party's witnesses in order to avoid a summary judgment:

> As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion. . ." Instead, the plaintiff must present affirmative evidence to defeat a properly supported motion for summary judgment.

Anderson, 477 U.S. at 256-57 (citation omitted); *accord Street*, 886 F.2d at 1479 ("[t]he respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact"); 100 Harv. L.R. at 254 & n.38.

With this standard in mind, the court will proceed to examine Plaintiff's claim that her demotion violated her constitutional rights protected by 42 U.S.C. § 1983.

B. "Persons" under § 1983

The analysis of an action under 42 U.S.C. § 1983 against a state, its agencies, state officials acting in their official capacities, and state officials in their individual capacities must begin by determining if a state, its agencies, and state officials acting in their official capacities are "persons" as defined by the statute, which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

As the case law has evolved under § 1983, the term "persons" has been expanded to include municipalities. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Additionally, there has been much litigation concerning whether a state, its agencies, and state officials are "persons" under § 1983, resulting in a split among the circuit courts of appeals concerning this definition. However, in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), the United States Supreme Court resolved this conflict among the circuit courts of appeals, holding that neither a state nor its officials acting in their official capacities are "persons" under § 1983.

Furthermore, a distinction developed regarding the definition of "persons" under § 1983 between claims for compensatory damages and claims for injunctive and declaratory relief. The *Will* Court held that as to claims for compensatory damages, neither a state nor its officials acting in their official capacities are "persons" under § 1983; nevertheless, the *Will* Court approved claims for injunctive and declaratory relief against state officials acting in their official capacities reasoning that "official-capacity actions for prospective relief are not treated as actions against the State.", 491 U.S. at 71, n. 10.

In short *Will v. Michigan Dept. of State Police, supra*, teaches that a state, its agencies and state officials sued in their official capacities for compensatory damages are not "persons" under § 1983. However, state officials sued in their official capacities are "persons" under § 1983 for purposes of prospective claims for injunctive and declaratory relief.

Thereafter, in 1991, the definition of "persons" was further refined in *Hafer v. Melo*, 502 U.S. ___, 112 S.Ct. 358 (1991), wherein the United States Supreme Court held that state officials sued in their individual capacities are "persons" within the meaning of § 1983; therefore, such officials are subject to personal liability on claims for compensatory damages under § 1983 for actions against them in their official capacities.

Thus, the definition of the term "persons" under § 1983 as it has developed to date indicates that a state, its agencies, and state officials acting in their official capacities are not "persons" under § 1983 for

purposes of claims for compensatory damages. However, for purposes of claims for prospective injunctive and declaratory relief, state officials acting in their official capacities are "persons" under § 1983. Concerning state officials sued in their individual capacities, they are "persons" under § 1983 for purposes of all claims.

C. The Eleventh Amendment/sovereign immunity defense

1. Claims for monetary relief

It is well settled that the Eleventh Amendment prohibits suits in federal courts under § 1983 against a state, its agencies, and state officials acting in their official capacities "by private parties seeking to impose a liability which must be paid from public funds in the state treasury," *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Further, the doctrine of sovereign immunity, a familiar common law doctrine, bars a § 1983 claim for monetary relief in state court. "The principle is elementary that a State cannot be sued in its own courts without its consent." *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1880).

Therefore, Plaintiff's claims for monetary relief against the Commonwealth of Kentucky, the Cabinet for Human Resources, and the state officials sued in their official capacities cannot stand; they are unsupported by any case law or statutory authority.

2. Claims for declaratory and injunctive relief

Will v. Michigan Dept. of State Police, supra, and *Kentucky v. Graham*, 473 U.S. 159 (1985), teach that the Eleventh Amendment prohibits claims against state or a state agency under § 1983 for injunctive and declaratory relief. However, these two cases also teach that when a state official is sued in his official capacity and the relief sought is injunctive relief, the state official would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Will v. Michigan Dept. of State Police*, 491 at 71, n. 10; *Kentucky v. Graham*, 473 U.S. at 167, n. 14.

Thus, Plaintiff's claims under § 1983 against the state officials in their official capacities for injunctive and declaratory relief in respect to (1) reinstatement to her position as Field Office Manager of the Winchester DES office, with the accompanying pay grade and salary for that position, and (2) the expungement of all references to her reprimand and demotion from her personnel record are prospective in nature and would not be barred by the Eleventh Amendment.

Summarizing the Eleventh Amendment/sovereign immunity defense, the Eleventh Amendment bars all claims under § 1993 for monetary relief against a state, its agencies, and state officials acting in their official capacities. The Eleventh Amendment also bars claims under § 1983 for injunctive relief against a state and its agencies; however, claims for injunctive relief against a state official acting in his official capacity are prospective in nature and are not barred by the Eleventh Amendment.

D. The qualified immunity defense

The determination of whether qualified immunity is applicable in a given case is purely a matter of law to be resolved by the court. *See Garvie v. Jackson*, 845 F.2d 647 (6th Cir. 1988). As seen from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), evaluation of qualified immunity or the "good faith" defense is both an objective and a subjective determination. The *Harlow* Court stated:

> . . . Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would **not** be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . ." *Ibid.* (emphasis added).
>
> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be de-

> cided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

457 U.S. at 815-816.

The *Harlow* Court summarized its holding on qualified immunity as follows:

> . . . We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. at 322.

Id. at 818.

In 1987, the standard for determining whether government officials are entitled to qualified immunity and protection from civil damages was further refined in *Anderson v. Creighton*, 483 U.S. 635 (1987), wherein the United States Supreme Court stated:

> . . . Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were "clearly established" at the time it was taken, *Id.*, at 818.

483 U.S. at 639. In determining whether the rules were "clearly established" at the time of the alleged violation, the court must examine the "federal constitutional, statutory or case law existing at the time" of the official conduct in question. *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988).

The official conduct complained of herein (the removal of the Plaintiff, without advance notice and a hearing, from her position as the Field Office Manager of the Winchester DES office on May 3, 1990, the temporary reassignment to a non-managerial position, and the subsequent permanent demotion on May 30, 1991, without advance notice or hearing, to the position of Senior Unemployment Insurance Examiner, with a reduction in salary from a pay grade 14 to

a pay grade 9, and permanent reassignment to the DES office in Lexington) occurred in May 1990 and May 1991. Therefore, it then becomes necessary to examine the federal constitutional, statutory or case law existing in May 1990 and May 1991 to determine if Plaintiff was entitled to due process (i.e., notice and a hearing) prior to her removal from the position as Field Office Manager of the Winchester DES office.

Whether Plaintiff possessed a property interest in continued employment in her position as manager of the Winchester DES office is determined by state law. As a permanent, full-time employee of the Commonwealth of Kentucky in the area of employment and social services for more than twenty-five (25) years, Plaintiff had acquired tenure in her employment. *See* KRS 18A.005(31). Thus, it is clear that Plaintiff had a property right in continued employment in her position as Field Office Manager of the Winchester DES office; therefore, the state could not deprive her of her continued employment in this position without due process, as evidenced by KRS 18A.095, which provides in pertinent part:

> (1) A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for cause.

Having established that the state could not deprive Plaintiff of her continued employment as the manager of the Winchester DES office without due process, the court must determine from an examination of the federal constitutional, statutory or case law applicable to Plaintiff's due process rights as a tenured state employee whether the Defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra* at 818; *Anderson v. Creighton, supra.*

One of the leading cases setting out the due process to which a tenured employee is entitled prior to adverse employment action is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), an employment termination case. Although the present action concerns a demotion rather than employment termination, *Loudermill* is instructive and applicable hereto.

In *Loudermill*, the Cleveland Board of Education advised one of its security guards, Mr. Loudermill, who under Ohio law was a "classified civil servant," by letter that his employment had been terminated because the school board had determined that he had

falsified his employment application. Mr. Loudermill's employment was terminated without notice and a hearing. The trial court dismissed Mr. Loudermill's action, holding that he had failed to state a claim because his termination was subject to review by the Civil Service Commission and the Ohio state courts. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that Mr. Loudermill had been deprived of due process. 721 F.2d 550 (6th Cir. 1983). The United States Supreme Court granted certiorari and affirmed. 470 U.S. 532 (1985).

Loudermill recognized that property interests are not created by the Constitution; instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . ." *Id.* at 538 (quoting *Board of Regents v. Roth, supra*, at 577). The *Loudermill* Court also recognized that while a state may elect not to confer a property interest in public employment, "it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards." *Id.* at 532 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974). Further, even if a state has procedural safeguards in place to give an employee due process, minimum constitutional due process is a matter of federal law, as *Loudermill* reiterated in the following statement:

> . . . In *Vitek v. Jones*, 445 U.S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

Id.

Loudermill does not appear to be limited to employment termination cases and does not appear to require a full-blown evidentiary type hearing. *Loudermill* simply requires notice to the employee and some type of hearing that would give the employee the chance to respond either orally or in writing to the proposed adverse employment action, as seen from the following text:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the

> case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original);

Id. at 542.

In a nutshell, *Loudermill* held that a tenured public employee was entitled to minimum due process, elaborating as follows:

> The essential elements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. *See* Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546.

It is clear that tenured state employees of the Commonwealth of Kentucky have a property interest in continued employment. *See* KRS 18A.095. Thus, even though Plaintiff Is employment with the Commonwealth of Kentucky was not terminated, *Loudermill* teaches that she was entitled to due process (i.e., notice and an opportunity to respond) before being removed from her position as manager of the Winchester DES office.

The *Loudermill* decision was rendered by the United States Supreme Court on March 19, 1985. There is no indication in *Loudermill* that the holding therein was limited to employment termination cases. In fact, as set out above, the *Loudermill* Court explains repeatedly that a tenured public employee is entitled to due process before any "adverse employment action" is taken against that employee; the Court did not restrict its holding that a tenured public employee was entitled to due process only prior to employment termination. Consequently, this court interprets *Loudermill* to apply any time a tenured public employee is subjected to adverse employ-

ment action of any significant nature, rather than only to employment termination cases.

Consequently, since *Loudermill* was decided in 1985, *more than five years prior to the adverse personnel action to which Plaintiff was subjected in May 1990 and May 1991*, the court concludes that Plaintiff's constitutional due process rights were clearly established in May 1990 and May 1991, and that these constitutional rights were "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra* at 818. Therefore, the court holds that as a matter of law, the individual Defendants are not entitled to qualified immunity on Plaintiff's claims against them in their individual capacities for compensatory damages.

E. The due process claim

The Defendants concede that Plaintiff was given no advance notice or a hearing prior to her removal as the Field Office Manager of the Winchester DES office on May 3, 1990, and temporary reassignment as an interviewer in the Georgetown DES office. The Defendants also acknowledge that Plaintiff was given no advance notice or a hearing on May 30, 1991, when she was restored to her position as Field Office Manager of the Winchester DES office, and on the same day, when (1) she was demoted to the position of Senior Unemployment Insurance Examiner, (2) her pay grade was reduced from a pay grade 14 to a pay grade 9, resulting in a salary reduction of approximately $319.00 per month, and (3) she was reassigned to the DES office in Lexington, Kentucky.

However, the Defendants contend that Plaintiff was not entitled to notice and a hearing prior to her removal as manager of the Winchester DES office because the Defendants did not terminate her employment and that she was merely reassigned to facilitate the investigation of the Winchester DES office. The Defendants also contend that since there were administrative remedies available to the Plaintiff to challenge her temporary removal as the manager of the Winchester DES office and subsequent demotion, she has no valid due process claim.

Analysis

The viability of Plaintiff's due process claim hinges on whether she had a property right in continued employment in her position as

Field Office Manager of the Winchester DES office. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972). If so, the state could not deprive her of her continued employment in this position without due process. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

To reiterate, Plaintiff has been a permanent, full-time employee of the Commonwealth of Kentucky in the area of employment and social services for more than twenty-five (25) years. As an employee with sixteen (16) or more years of permanent, full-time employment in classified service, Plaintiff is a "career employee," as defined in KRS 18A.005(4). Further, since Plaintiff's employment in classified service extended beyond the probationary period, she had also acquired tenure in her employment. *See* KRS 18A.005(31). Thus, it is clear that Plaintiff had a property right in continued employment in her position as Field Office Manager of the Winchester DES office; therefore, the state could not deprive her of her continued employment in this position without due process, as evidenced by KRS 18A.095, which provides in pertinent part:

> (1) A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for cause.

Nevertheless, the Defendants argue that Plaintiff was not entitled to advance notice or a hearing prior to being removed as the manager of the Winchester DES office because (1) she was not terminated, and (2) she had administrative remedies available to her.

1. Employment termination versus demotion

In the preceding portion of this Memorandum Opinion addressing the qualified immunity defense, section III. D., *supra*, the court noted that one of the leading cases setting out the due process to which a tenured employee is entitled prior to adverse employment action is *Cleveland Board of Education v. Loudermill, supra*, an employment termination case. Finding no language in *Loudermill* to suggest that the holding therein was limited to employment termination cases, the court held that *Loudermill* is applicable to the present action.

Tenured state employees of the Commonwealth of Kentucky have a property interest in continued employment. *See* KRS 18A.095. Thus, even though Plaintiff's employment with the Commonwealth of Kentucky was not terminated, *Loudermill* teaches that she was

entitled to due process (i.e., notice and an opportunity to respond) before being removed from her position as manager of the Winchester DES off ice. It is equally clear that Plaintiff received no due process either on May 3, 1990, when she was temporarily demoted to the position of interviewer and assigned to the Georgetown DES office, or on May 30, 1991, when she was permanently demoted to the position of Senior Unemployment Insurance Examiner and assigned to the Lexington DES office.

2. Available administrative remedies

The Defendants argue that they are entitled to summary judgment because Plaintiff did not pursue the administrative remedies available to her prior to filing this action. However, it is well settled that claimants pursuing a cause of action under 42 U.S.C. § 1983 are not required to exhaust their state administrative remedies prior to initiating litigation under 1983. *See Hammon v. Baldwin*, 866 F.2d 172 (6th Cir. 1989); *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982). Thus, Defendants' contention on this point is without merit.

To summarize the analysis of Plaintiff's due process claim, based on (1) the teachings of *Loudermill*, (2) the Defendants, concession that adverse personnel was taken against Plaintiff without advance notice and a hearing, (3) the court's holding that as a matter of law, the Defendants are not entitled to qualified immunity, and (4) the fact that Plaintiff was not required to exhaust her state administrative remedies before filing this action, the court is of the opinion that Plaintiff is entitled to partial summary judgment on her due process claim.

F. The First Amendment Claim

Plaintiff alleges that the actions taken by the state officials on May 3, 1990, when she was removed from her position as manager of the Winchester DES office and temporarily reassigned to the position of interviewer in the Georgetown DES office, and on May 30, 1991, when she was demoted to the position of Senior Unemployment Insurance Examiner and permanently assigned to the Lexington DES office, were in retaliation against her for refusing to violate the state merit system law, for refusing to engage in political patronage activities, for recommending that Franklin L. Gibson not be retained beyond his probationary period, and for reporting the activities of Franklin L. Gibson and James B. Little, which she deemed to be

illegal, to her supervisors and other authorities. Her demotion was accompanied by a reduction in job classification, rank, pay grade, and salary. Plaintiff claims that the Defendants' actions violated the First Amendment.

Plaintiff submits that the First Amendment protects her right as a citizen and a public employee to comment on matters of public concern. *Pickering v. Board of Education*, 391 U.S. 563 (1968), and that this right extends to statements made to supervisors. *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979). Further, Plaintiff contends that statements made by a public employee relating to political corruption are "a matter of interest to the community upon which it is essential that public employees be able to speak out freely" without fear of retaliation by their superiors. *Connick v. Myers*, 461 U.S. 138, 149 (1983). These statements are protected unless made with knowledge of, or reckless indifference to, their falsity. *Gossman v. Allen*, 950 F.2d 338 (6th Cir. 1991).

To counter Plaintiff's First Amendment claim, the Defendants' assert that their actions were not taken against her in retaliation for the exercise of her First Amendment rights; instead, the Defendants contend that Plaintiff was initially removed from the Winchester DES office on May 3, 1990, ostensibly for the purpose of facilitating the investigation of that office by the CHR Office of Inspector General. Further, the Defendants characterize their actions taken against Plaintiff as "progressive discipline" for her poor management of the Winchester DES office.

Analysis

Based on the conflicting positions taken by the parties on Plaintiff's First Amendment claim, the court is of the opinion that whether Plaintiff was penalized and demoted in retaliation for the exercise of her First Amendment rights or whether she was properly "progressively disciplined" by the Defendants because she was a bad manager is a question of fact that must be resolved by a jury. These conflicting claims present genuine issues of material fact.

The contrary reasons presented for Plaintiff's demotion concern issues of credibility that can only be resolved by a jury. Consequently, the court concludes that the Defendants are not entitled to summary judgment on Plaintiff's First Amendment claim.

IV. Conclusion

To summarize the foregoing analysis of this action, the court concludes that the Commonwealth of Kentucky, the Cabinet for Human Resources, and the state officials sued in their official capacities are not "persons" under § 1983 for purposes of Plaintiff's claims for compensatory damages. However, in respect to Plaintiff's claims for prospective injunctive and declaratory relief, the state and its agencies are not "persons" under § 1983, but the state officials acting in their official capacities are "persons" in respect to these claims. Concerning Plaintiff's claims against the state officials in their individual capacities, the state officials are "persons" under § 1983 for claims for compensatory damages and for injunctive and declaratory relief.

The Eleventh Amendment bars all claims under § 1983 for monetary relief against a state, its agencies, and state officials acting in their official capacities. The Eleventh Amendment also bars claims under § 1983 for injunctive relief against a state and its agencies; however, claims for injunctive relief against a state official acting in his official capacity are prospective in nature and are not barred by the Eleventh Amendment.

Having concluded that as a tenured state employee, Plaintiff had a property interest in continued employment in her position as Field Office Manager of the Winchester DES office, and having also concluded that Plaintiff was entitled to due process (i.e., notice and a hearing prior to the imposition of the adverse employment action), the state officials violated Plaintiff's clearly established due process rights that were recognized in 1985 in *Cleveland Board of Education v. Loudermill, supra*; therefore, these state officials should reasonably have known about Plaintiff's due process rights in 1990 and 1991. Consequently, the state officials are not entitled to the defense of qualified immunity for their actions. The reasonableness of the conduct of the state officials is a question of fact that must be determined by a jury.

With the Defendants' concession that Plaintiff received no due process of any nature prior to neither the temporary nor the permanent removal of her from the position as manager of the Winchester DES office, in view the previous holding that *Cleveland Board of Education v. Loudermill, supra*, is applicable to this action, the court concludes that Plaintiff is entitled to partial summary judgment on her due process claim.

Finally, the court concludes that due to the conflicting positions taken by the parties on Plaintiff's First Amendment claim, the Defendants are not entitled to summary judgment on any of Plaintiff's claims. The parties, diametrically opposed positions present genuine issues of material fact that can only be resolved by a jury.

An Order and Judgment consistent with this Memorandum Opinion will be entered on the same date herewith.

This 22nd day of January, 1993.

/s/
KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-193

MAGGIE WILLIAMS,
Plaintiff

V. ORDER AND JUDGMENT

COMMONWEALTH OF
KENTUCKY, ET AL.,
Defendants

Entered and Filed January 22, 1993

In accordance with the Memorandum Opinion entered on the same date herewith,

IT IS HEREBY ORDERED and **ADJUDGED**, as follows:

1. The Commonwealth of Kentucky, the Cabinet for Human Resources, and the state officials sued in their official capacities are not "persons" under 42 U.S.C. § 1983 in respect to Plaintiff's claims for compensatory damages. Therefore, Plaintiff's claims against the Commonwealth of Kentucky, the Cabinet for Human Resources, and the Defendant state officials sued in their official capacities are **DISMISSED**.

2. The Defendant state officials sued in their official capacities are "persons" under 42 U.S.C. § 1983 in respect to Plaintiff's claims for prospective injunctive and declaratory relief. Therefore, Plaintiff's claims for injunctive and declaratory relief can proceed to trial.

3. The Defendant state officials sued in their individual capacities are "persons" under 42 U.S.C. § 1983 in respect to Plaintiff's claims for compensatory damages and Plaintiff's claims for injunctive and declaratory relief. Therefore, Plaintiff's claims against the state officials sued in their individual capacities can proceed to trial.

4. The Eleventh Amendment bars Plaintiff's claims for compensatory damages against the state, its agencies, the state officials sued in their official capacities, and Plaintiff's claims for injunctive relief against the state and its agencies. Therefore, Plaintiff's claims for monetary relief against the Commonwealth of Kentucky, the Cabinet for Human Resources, and the Defendant state officials sued in their official capacities are DISMISSED. Likewise, Plaintiff's claims for injunctive relief against the Commonwealth of Kentucky and the Cabinet for Human Resources are **DISMISSED**.

5. The Eleventh Amendment does not bar Plaintiff's claims for injunctive relief against the state officials sued in their official capacities. Therefore, these claims can proceed to trial.

6. Pursuant to KRS 18A.095(1), Plaintiff, Maggie Williams, is a tenured state employee who had a property interest in retaining her position as Field Office Manager of the Winchester DES office. By reason of this property interest, Plaintiff was entitled to due process (i.e., notice and an opportunity to be heard) prior to the imposition of any adverse employment action. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

7. Since *Loudermill* recognized Plaintiff's constitutional due process rights in 1985, these due process rights were clearly established in May 1990 and May 1991 when Plaintiff's due process rights were violated, and a reasonable state official should have known of these clearly established due process rights in 1990 and 1991. Therefore, the court holds that the state officials sued in their individual capacities are not entitled to qualified immunity from civil damages.

8. The Defendants having conceded that Plaintiff received no due process prior to the imposition of the adverse employment action, Plaintiff's motion for partial summary judgment on her due process claim (Docket Entry #115) is **GRANTED**.

9. There being a genuine issue of material fact concerning the circumstances giving rise to Plaintiff's First Amendment claim, the Defendants' motion for summary judgment on all federal claims (Docket Entry #78) is **DENIED**.

10. There being no just reason for delay, pursuant to Fed.R.Civ.P. 54(b), this judgment is final as to the court's determination that the Eleventh Amendment is not a complete bar to Plaintiff's claims and the court's holding that individual Defendants are not entitled to qualified immunity and as to Plaintiff's motion for partial summary judgment on her due process claim.

11. This is a final and appealable Order and Judgment.

This 22nd day of January, 1993.

/s/
KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-193

MAGGIE WILLIAMS,
Plaintiff

V. SUPPLEMENTAL OPINION

COMMONWEALTH OF
KENTUCKY, ET AL.,
Defendants

Entered and Filed April 28, 1993

I. Introduction

Plaintiff, Maggie Williams, is a tenured employee of the Commonwealth of Kentucky. She has been employed by the state for more than twenty-five (25) years in the areas of employment and social services by the Cabinet for Human Resources ("CHR"), Department for Employment Services ("DES"), Division for Field Services ("DFS") . From February 1985 until May 3, 1990, Plaintiff was the manager of the DES office in Winchester, Kentucky, and its satellite office in Richmond, Kentucky, wherein she supervised approximately thirty (30) employees. These "unemployment offices" administer state and federally funded unemployment insurance and employment services programs for the Commonwealth of Kentucky.

Plaintiff brings this action under 42 U.S.C. § 1983, alleging that the Defendants violated her constitutional rights under the First and Fourteenth Amendments in May 1990 and May 1991, when in the absence of advance notice or a hearing, she was removed from her position as Field Office Manager of the Winchester DES office and

temporarily assigned to work as an interviewer in the Georgetown DES office. Plaintiff states that this reassignment was accompanied by the revocation of her executive supervisory status and a reduction in salary, from a pay grade 13 down to a pay grade 8. Thereafter, Plaintiff alleges that on May 30, 1991, she was restored to her position as Field Office Manager of the Winchester DES office, and on the same day, without advance notice or hearing, (1) she was demoted to the position of Senior Unemployment Insurance Examiner, (2) her pay grade was reduced from a pay grade 14 to a pay grade 9, resulting in a salary reduction of approximately $319.00 per month, and (3) she was reassigned to the DES office in Lexington, Kentucky. Plaintiff also has pendent state claims for wrongful discharge and for violations of KRS 61.102 and 18A.095.

Plaintiff seeks (1) to be restored to her position as Field Office Manager of the Winchester DES office, with the accompanying pay grade and salary for that position, plus all increases and other employment benefits that she would have received in this position between May 3, 1990, and the date of judgment, and (2) the expungement of all references to her reprimand and demotion from her personnel record. Plaintiff also seeks compensatory and punitive damages, plus attorney's fees.

On January 22, 1993, the court denied the Defendants' motion for summary judgment based on qualified immunity on Plaintiff's federal claims and granted the Plaintiff's motion for partial summary judgment on her due process claim, holding that as a matter of law, the Defendants knew or reasonably should have known that subjecting Plaintiff to a demotion without advance notice or an opportunity to be heard on the charges against her leading to the demotion violated her "clearly established" due process rights. Further, the court denied the Defendants' motion for summary judgment on Plaintiff's claims that the actions of the Defendants in demoting her also violated the First Amendment in that these actions were allegedly taken in retaliation for her reporting to her supervisors and other officials the conduct of other employees in the Winchester DES office that she thought were illegal. The reasons proffered by the Defendants for Plaintiff's demotion and the reasons proffered by the Plaintiff for her demotion presented a genuine issue of material fact precluding summary judgment on Plaintiff's First Amendment claim.

Thereafter, on February 12, 1993, the Defendants appealed the decision that they were not entitled to qualified immunity on Plaintiff's

due process claim and hence not entitled to summary judgment on this claim to the United States Court of Appeals for the Sixth Circuit.

This matter is before the court on the Defendants' motion, pursuant to Fed.R.Civ.P. 59, to vacate, alter or amend the partial summary judgment awarded to the Plaintiff on January 22, 1993, and the Plaintiff's motion for leave to file a rejoinder to Defendants' reply to her response to the Defendants' second motion to vacate, alter or amend the partial summary judgment awarded to her on January 22, 1993. These motions having been fully briefed, they are ripe for consideration.

II. The Pending Motions

A. Defendants' Second Motion to Vacate, Alter or Amend

The Defendants argue that the partial summary judgment as to liability on Plaintiff's due process claim must be set aside for a variety of reasons: (1) the partial summary judgment failed to address the individual Defendants' factual defense of good faith; (2) the court failed to make any findings regarding the relative culpability of the individual Defendants; (3) neither KRS 18A.095 nor *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), addresses the question of demotions; (4) the court's decision that Plaintiff had a "significant property interest" in a specific position was unsupported by any authority conferring constitutional protection in a specific employment position; (5) the court's decision that a *Loudermill* hearing is required prior to demotion is unsupported by any authority; and (6) the court improperly extended *Loudermill* to demotion cases.

To summarize Plaintiff's response to this motion, Plaintiff submits that the court has repeatedly explained the rationale underlying the partial summary judgment as to liability on her due process claim and that the court's decision is firmly supported by *Loudermill*, case law preceding and succeeding *Loudermill*, and Kentucky's statutory scheme that protects the property interests of its classified, tenured employees, such as herself.

Analysis

1. The individual Defendants' factual/personal defense of good faith

Quite simply, the court did not address the individual Defendants' "factual defense of good faith," their defense of "personal good faith," their "personal defense of reasonable reliance upon advice of coun-

sel" because these personal defenses are not the standard under which the qualified immunity defense must be evaluated. To reiterate, as seen from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982):

> . . . We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. at 322.

Id. at 818.

In 1987, the standard for determining whether government officials are entitled to qualified immunity and protection from civil damages was further refined in *Anderson v. Creighton*, 483 U.S. 635 (1987), wherein the United States Supreme Court stated:

> . . . Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were 'clearly established' at the time it was taken, *Id.*, at 818.

483 U.S. at 639.

Thus, as a matter of law, the individual Defendants were held to a standard of "objective legal reasonableness" examined in view of the legal rules that were "clearly established" at the time their actions were taken in 1990 and 1991. The individual Defendants' personal defenses of "good faith" or "reliance on advice of counsel" are no longer viable in light of *Harlow* and *Anderson*; therefore, it was unnecessary to address the merits of these personal defenses.

2. The relative culpability of the individual Defendants

The court made no findings as to the relative culpability of the individual Defendants because such a finding would invade the province of the jury, the fact-finder herein. In reviewing this record in January of 1993 to determine whether the individual Defendants were entitled to qualified immunity on Plaintiff's federal claims, the court concluded that the individual Defendants were not entitled to

qualified immunity because Plaintiff did not receive a *Loudermill* hearing prior to her demotion. The fact that Plaintiff received no *Loudermill* hearing was the decisive factor in determining that the individual Defendants were not entitled to qualified immunity.

The court did not consider the actions of the individual Defendants and made no attempt to assign relative culpability to each of the individual Defendants in determining that collectively they were not entitled to qualified immunity. It is the function of the jury, not the court, to consider the actions of the individual Defendants and to make findings of fact as to their relative culpability. Thus, the Defendants' argument that the partial summary judgment to the Plaintiff is fatally flawed because it did not contain findings as to their relative culpability is without merit.

3. KRS 18A.095 and *Loudermill* vis-a-vis demotions

The Defendants argue that the court's application of KRS 18A.095 and *Loudermill* to this action was improper because both KRS 18A.095 and *Loudermill* concern only discharge cases, as opposed to demotion cases.

a. KRS 18A.095

KRS 18A.095 provides in pertinent part:

> (1) A classified employee with status shall not be dismissed, *demoted*, suspended or *otherwise penalized except for cause*. (Emphasis added) .

Contrary to Defendants' argument, this statute clearly applies to demotions. Defendants' argument is without merit.

b. *Loudermill*

To reiterate, *Loudermill*, is one of the leading cases setting out the due process to which a tenured employee is entitled prior to adverse employment action. Although *Loudermill* concerned an employee termination rather than an employee demotion, the court was and is of the opinion that *Loudermill* is instructive, relevant and applicable to the present action.

In *Loudermill*, the Cleveland Board of Education advised one of its security guards, Mr. Loudermill, who under Ohio law was a "classified civil servant," by letter that his employment had been

terminated because the school board had determined that he had falsified his employment application. Mr. Loudermill's employment was terminated without notice and a hearing. The trial court dismissed Mr. Loudermill's action, holding that he had failed to state a claim because his termination was subject to review by the Civil Service Commission and the Ohio state courts. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that Mr. Loudermill had been deprived of due process. 721 F.2d 550 (6th Cir. 1983). The United States Supreme Court granted certiorari and affirmed. 470 U.S. 532 (1985).

Loudermill recognized that property interests are not created by the Constitution; instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . ." *Id.* at 538 (quoting *Board of Regents v. Roth, supra*, at 577). The *Loudermill* Court also recognized that while a state may elect not to confer a property interest in public employment, "it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards." *Id.* at 532 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974). Further, even if a state has procedural safeguards in place to give an employee due process, minimum constitutional due process is a matter of federal law, as *Loudermill* reiterated in the following statement:

> . . . In *Vitek v. Jones*, 445 U.S. 480, 491 (1980), we pointed out that "minimum (procedural) requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

Id.

As previously pointed out, *Loudermill* does not appear to be limited to employment termination cases and does not appear to require a full-blown evidentiary type hearing. *Loudermill* simply requires notice to the employee and some type of hearing that would give the employee the chance to respond either orally or in writing to the proposed adverse employment action, as seen from the following text:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and oppor-

> tunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original);

Id. at 542.

In a nutshell, *Loudermill* held that a tenured public employee was entitled to minimum due process, elaborating as follows:

> The essential elements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. *See* Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546.

Contrary to Defendants' assertions, there is no indication in *Loudermill* that its holding was limited to termination cases. In fact, as seen from the foregoing text of *Loudermill* the Court spoke in terms of "adverse official action," "proposed action," and deprivation "of a significant property interest" throughout its opinion. Thus, a fair reading of *Loudermill* leads to the conclusion that it is applicable to not only termination cases but also to cases where a tenured, public employee is subjected to a demotion or other adverse employment action. The Defendants simply read *Loudermill* too narrowly. The court finds no merit to their interpretation of *Loudermill*.

4. A "significant property interest" in a specific position

The Defendants submit that the court's decision that Plaintiff had a "significant property interest" in her position in a specific position was unsupported by any authority conferring constitutional protection in a specific employment position.

To reiterate, whether Plaintiff possessed a property interest in continued employment in her position as manager of the Winchester DES office is determined by state law. As a permanent, full-time employee of the Commonwealth of Kentucky in the area of employment and social services for more than twenty-five (25) years, Plaintiff had acquired tenure in her employment. *See* KRS 18A.005(31). Thus, due to the fact that Plaintiff is a tenured state employee, it is clear that she had a property right in continued employment in her position as Field Office Manager of the Winchester DES office; therefore, the state could not deprive her of her continued employment in this position without due process, as evidenced by KRS 18A.095, which provides that "[a] classified employee with status shall not be dismissed, *demoted*, suspended or *otherwise penalized except for cause*." (Emphasis added).

It is clear that tenured state employees of the Commonwealth of Kentucky have a property interest in continued employment. *See* KRS 18A.095. Thus, even though Plaintiff's employment with the Commonwealth of Kentucky was not terminated, *Loudermill* teaches that she was entitled to due process (i.e., notice and an opportunity to respond) before being removed from her position as manager of the Winchester DES office.

The *Loudermill* decision was rendered by the United States Supreme Court on March 19, 1985. Again, there is no indication in Loudermill that the United States Supreme Court limited its holding to employment termination cases. In fact, as set out above, the Loudermill Court explains repeatedly that a tenured public employee is entitled to due process before any "adverse employment action" is taken against that employee; the Court did not confine its holding to the employment termination of tenured public employees.

Since *Loudermill* was decided in 1985, *more than five years prior to the adverse personnel action to which Plaintiff was subjected in May 1990 and May 1991*, the court concluded that Plaintiff's constitutional due process rights were clearly established in May 1990 and May 1991, and that these constitutional rights were "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra* at 818. Therefore, the court held that as a matter of law, the individual Defendants are not entitled to qualified immunity on Plaintiff's claims against them in their individual capacities for compensatory damages.

Contrary to the Defendants' contentions, the court's previous holding that Plaintiff had a "significant" property interest in her continued employment as the manager of the DES unemployment office in Winchester, Kentucky, is supported by KRS 18A.095 and *Loudermill*. The Defendants' reliance on *Davis v. Scherer*, 468 U.S. 183 (1984) is misplaced because (1) *Davis* predates *Loudermill*, and (2) KRS 18A.095 is the statute that provided the basis for Plaintiff's cause of action.

5. *Loudermill* hearing prior to demotion

The Defendants also argue that the court's decision that Plaintiff was entitled to a *Loudermill* hearing prior to her demotion is "clearly established law." As explained above in Section II.A.4., because *Loudermill* was decided in 1985, *five years prior to the adverse employment to which Plaintiff was subjected in 1990 and 1991*, the court was of the opinion and remains of the opinion that her right to a hearing prior to demotion had been "clearly established" by 1990 and 1991. Consequently, the court finds no merit to Plaintiff's argument on this point.

6. The extension of *Loudermill* to demotion cases

Finally, the Defendants argue that the court improperly extended *Loudermill* to demotion cases. As explained above in Section II.A.3., there is no language in *Loudermill* to remotely suggest that its holding was confined to termination cases. Thus, the court finds no merit to Plaintiff's argument on this point.

B. Plaintiff's Motion For Leave To File Rejoinder To Reply

Plaintiff has moved for leave to file a rejoinder to the Defendants' reply to her response to their second motion to vacate, alter or amend the partial summary judgment in her favor and denying their motion for summary judgment on qualified immunity. As grounds for this motion, Plaintiff points out that the Defendants raised new arguments in their reply that were not presented in their original memorandum filed in support of their motion for summary judgment on qualified immunity.

The Defendants having filed a response to Plaintiff's tendered rejoinder, and the court having considered both Plaintiff's tendered rejoinder and the Defendants' response in evaluating the Defendants'

second motion to vacate, alter or amend, Plaintiff's motion for leave to file a rejoinder will be granted.

III. Qualified Immunity and Plaintiff's First Amendment Claim

The extensive memoranda submitted in support of the Defendants' first and second motions to vacate, alter or amend the judgment granting Plaintiff partial summary judgment on her due process claim and denying the Defendants summary judgment on all federal claims by reason of qualified immunity indicate that there is confusion over whether the court specifically addressed the issue of whether the Defendants were entitled to qualified immunity on Plaintiff's First Amendment claim.

Plaintiff alleged that the actions taken by the state officials on May 3, 1990, violated the First Amendment because she had the right as a citizen and a public employee to comment on matters of public concern, *Pickering v. Board of Education*, 391 U.S. 563 (1968), and that this right extends to statements made to supervisors. *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979). Further, Plaintiff contended that statements made by a public employee relating to political corruption are "a matter of interest to the community upon which it is essential that public employees be able to speak out freely" without fear of retaliation by their superiors. *Connick v. Myers*, 461 U.S. 138, 149 (1983). These statements are protected unless made with knowledge of, or reckless indifference to, their falsity. *Gossman v. Allen*, 950 F.2d 338 (6th Cir. 1991).

To counter Plaintiff's First Amendment claim, the Defendants' asserted that their actions were not taken against her in retaliation for the exercise of her First Amendment rights; instead, the Defendants contended that Plaintiff was initially removed from the Winchester DES office on May 3, 1990, ostensibly for the purpose of facilitating the investigation of that office by the CHR Office of Inspector General. Further, the Defendants characterize their actions taken against Plaintiff as "progressive discipline" for her poor management of the Winchester DES office.

Due to the conflicting positions taken by the parties on Plaintiff's First Amendment claim, the court concluded that whether Plaintiff was penalized and demoted in retaliation for the exercise of her First Amendment rights or whether she was properly "progressively disciplined" by the Defendants because she was a bad manager was a

genuine issue of material fact that must be resolved by a jury. It is well settled that when there is a genuine issue of material fact surrounding a claim where the qualified immunity defense has been raised, summary judgment on qualified immunity is inappropriate. In that instance, the issue of a defendant's entitlement to qualified immunity is dependent upon whether the jury finds the defendant's version of the facts more credible, as seen in *Brandenburg v. Cureton*, 882 F.2d 211 (1989), which noted:

> This court ultimately decides the law to be applied. In this case, however, the jury becomes the final arbiter of appellant Sharp's claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury. If the jury determines that Sharp fired on Brandenburg without a belief that someone was in danger of serious bodily injury, then as a legal matter no reasonable officer could believe that such gunfire would not violate another's constitutional rights. On the other hand, if jury believes detective Sharp's version of the facts, he will be entitled to qualified immunity.

Id. at 215-16.

Thus, at this juncture, to reiterate, due to the genuine issue of material fact presented by the parties as to the reasons for Plaintiff's demotion, the individual Defendants are not entitled to qualified immunity on Plaintiff's First Amendment claim. Their entitlement to qualified immunity on this claim is dependent on which version of the facts the jury finds more credible.

IV. Conclusion

To summarize the foregoing analysis of the Defendants' second motion to vacate, alter or amend the judgment awarding partial summary judgment to the Plaintiff as to liability on her due process claim and denying the Defendants' motion for summary judgment on all federal claims based on qualified immunity, (1) in view of *Harlow* and *Anderson*, the individual Defendants' factual/personal defenses of good faith are of no assistance to them herein; (2) not being the finder of fact, the court was without authority to make any findings as to the relative culpability of the individual Defendants; (3) KRS 18A.095 expressly covers demotions, and there is no language in *Loudermill* to suggest that *Loudermill* is limited to termination cases;

(4) because Plaintiff is a classified, tenured public employee of the Commonwealth of Kentucky, KRS 18A.095 provides her with a "significant property interest" in her position as manager of the DES unemployment office in Winchester, Kentucky; (5) *Loudermill* expressly holds that a tenured public employee is entitled to notice and a hearing prior to the imposition of any adverse employment action; and (6) the court did not improperly extend *Loudermill* to demotion cases because *Loudermill* is not limited to termination cases.

Further, due to the conflicting positions taken by the parties on Plaintiff's First Amendment claim, at this juncture, the Defendants are not entitled to summary judgment based on qualified immunity on Plaintiff's First Amendment claim. The Defendants' entitlement to qualified immunity on this claim must be determined by the jury. *See Brandenburg v. Cureton*, 882 F.2d 211 (1989).

An Order and Judgment consistent with this Supplemental Opinion will be entered on the same date herewith.

This 28th day of April, 1993.

/s/
KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-193

MAGGIE WILLIAMS,
Plaintiffs

V. ORDER AND JUDGMENT

COMMONWEALTH OF
KENTUCKY, ET AL.,
Defendants

Entered and Filed April 28, 1993

In accordance with the Supplemental Opinion entered on the same date herewith,

IT IS HEREBY ORDERED and **ADJUDGED**, as follows:

1. The Defendants are not entitled to qualified immunity on Plaintiff's First Amendment claim because there is a genuine issue of material fact concerning the reasons for Plaintiff's demotion. *See Brandenburg v. Cureton*, 882 F.2d 211, 215-16 (6th Cir. 1989).

2. The Defendants' motion under Fed.R.Civ.P. 59 to vacate, alter or amend the judgment entered on January 22, 1993, awarding Plaintiff partial summary judgment on her due process claim and denying the Defendants' motion for summary judgment on the federal claims based on qualified immunity (Docket Entry #154) is **DENIED**.

3. The Plaintiff's motion for leave to file a rejoinder to the Defendants' reply to her response to their second motion to vacate, alter or amend the judgment entered on January 22, 1993 (Docket Entry #178) is **GRANTED**.

4. Plaintiff's Rejoinder to Defendants' Reply to Plaintiff's Response to Defendants' Second Motion to Vacate, Alter or Amend the Order of Partial Summary Judgment, tendered on April 15, 1993, **SHALL BE FILED**.

5. There being no just reason for delay, pursuant to Fed.R.Civ.P. 54(b), this judgment is final as to the court's determination that the individual Defendants are not entitled to qualified immunity on both Plaintiff's due process claim and Plaintiff's First Amendment claim.

6. This is a final and appealable Order and Judgment.

This 28th day of April, 1993.

/s/
KARL S. FORESTER, JUDGE

Ky. Rev. Stat. Ann. 18A.095 Rights of executive department employees; ex parte communications prohibited except under certain conditions

(1) A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

(2) Prior to dismissal, a classified employee with status shall be notified in writing of the intent to dismiss him. The notice shall also state:

(a) The specific reasons for dismissal including:

1. The statutory or regulatory violation;

2. The specific action or activity on which the intent to dismiss is based;

3. The date, time and place of such action or activity; and

4. The name of the parties involved; and

(b) That the employee has the right to appear personally, or with counsel if he has retained counsel, to reply to the head of the cabinet or his deputy.

(3) The department shall prescribe and distribute a form to be completed and forwarded by an employee who wishes to appear before the head of the cabinet or his deputy, to each appointing authority. Such form shall be attached to every notice of intent to dismiss, and shall contain written instructions explaining:

(a) The right granted an employee under the provisions of this section relating to pretermination hearings; and

(b) The time limits and procedures to be followed by all parties in pretermination hearings.

(4) No later than five (5) working days after receipt of the notice of intent to dismiss, excluding the day he receives such notice, the employee may request to appear, personally or with counsel if he has retained counsel, to reply to the head of the cabinet or his deputy.

(5) Such appearance shall be scheduled six (6) working days after receipt of an employee's request to appear before the head of the cabinet or his deputy, excluding the day his request is received.

(6) No later than five (5) working days after the employee appears before the head of the cabinet or his deputy, excluding the day of the appearance, the cabinet head or his deputy shall:

(a) Determine whether to dismiss the employee or to alter, modify or rescind the intent to dismiss; and

(b) Notify the employee in writing of the decision.

(7) If the cabinet head or his deputy determines that the employee shall be dismissed or otherwise penalized, the employee shall be notified in writing of:

(a) The effective date of his dismissal or other penalization;

(b) The specific reason for such action, including:

1. The statutory or regulatory violation;

2. The specific action or activity on which the dismissal or other penalization is based;

3. The date, time, and place of such action or activity; and

4. The name of the parties involved;

(c) That he may appeal such dismissal or other penalization to the board within thirty (30) days after receipt of this notification, excluding the day he receives notice.

(8) A classified employee with status who is demoted, suspended, or otherwise penalized shall be notified in writing of:

(a) The demotion, suspension or other penalization;

(b) The effective date of the demotion, suspension or other penalization;

(c) The specific reason for such action, including:

1. The statutory or regulatory violation;

2. The specific action or activity on which the demotion, suspension or other penalization is based;

3. The date, time and place of such action or activity; and

4. The name of the parties involved; and

(d) That he has the right to appeal to the board within thirty (30) days, excluding the day that he received notification.

(9) Any unclassified employee who is dismissed, demoted, suspended, or otherwise penalized for cause may, within thirty (30) days after such dismissal, demotion, suspension or other form of penalization, appeal to the board for review thereof.

(10)(a) An employee whose position is reallocated shall be notified in writing by the appointing authority of:

1. The reallocation; and

2. His right to request reconsideration by the commissioner within ten (10) working days of receipt of the notice, excluding the day he receives notification;

(b) He shall be provided with a form prescribed by the commissioner on which to request reconsideration; and

(c) The employee shall file a written request for reconsideration of the reallocation of his position with the commissioner in such manner and form as the commissioner may prescribe, and shall be given a reasonable opportunity to be heard thereon by the commissioner. The commissioner shall make a determination within sixty (60) days after the request has been filed by an employee. After reconsider of the request by the commissioner, the employee may appeal to the board.

(11) Any state employee, applicant for employment, or eligible on a register may appeal to the board on the grounds that his right to inspect or copy records, including preliminary and other supporting documentation, relating to him has been denied, abridged, or impeded by a public agency. The board shall conduct a hearing to determine whether the records related to the employee, applicant or eligible, and whether his right to inspect or copy such was denied, abridged, or impeded. If the board determines that the records related to the employee and that the right to inspect or copy such records has been denied, abridged, or impeded, the board shall order the public agency to make them available for inspection and copying and shall charge the cost of the hearing to the public agency. A state employee, an applicant for employment and an eligible on a register shall not have the right to inspect or to copy any examination materials.

(12) Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, handicap or age between forty 40) and seventy (70). Nothing herein shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, handicap or age in accordance with KRS Chapter 344.

(13) When an eligible's name is removed from a register, the commissioner shall notify the eligible of his action and the reasons therefor, together with his right of appeal. An eligible's name shall be restored to the register upon presentation of reasons satisfactory to the commissioner or in accordance with the decision of the board.

(14)(a) Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board;

(b) Any applicant whose application for admission to an open-competitive examination has been rejected shall be notified of such rejection and the reasons therefore and may appeal to the board for reconsideration of his qualifications and for admission to the examination. Applicants may be conditionally admitted to an examination by the commissioner pending reconsideration by the board;

(c) Any applicant who has taken an examination may appeal to the board for a review of his rating in any part of such examination to assure that uniform rating procedures have been applied equally and fairly;

(d) An appeal to the board by applicants or eligibles under subsections (11) and (13) of this section and under this subsection shall be filed in writing with the executive director not later than thirty (30) calendar days after the notification of the action in question was mailed.

(15) An evaluation may be appealed to the board if an employee has complied with the review procedure established under KRS 18A.112.

(16) (a) Appeals to the board shall be in writing on an appeal form prescribed by the board. Appeal forms shall be available at the employee's place of work. The department shall be responsible for the distribution of such forms;

(b) The appeal form shall be attached to any notice, or copy of such notice, of dismissal, demotion, suspension, fine, involuntary transfer, or other penalization, reallocation, or notice of any other action an employee may appeal under the provisions of this section. The appeal form shall instruct the employee to state whether he is a classified or unclassified employee, his full name, his appointing authority, work station address and telephone number, and if her has retained counsel at the time he files an appeal, the name, address and telephone number of his attorney;

(c) The form shall also instruct a classified employee to state the action he is appealing in a short, plain, concise statement of the facts. The form shall instruct an unclassified employee to make a short, plain, concise statement of the reason or cause given for his dismissal; and

(d) Upon receipt of the appeal by the board, the appointing authority and department of personnel shall be notified and the board shall schedule a hearing within the time limits prescribed by this section.

(17) All notices from the board shall be in writing. Notices shall be written so as to be understood by non-attorneys.

(18) (a) The appealing employee and the appointing authority whose action is reviewed shall have the right to be heard publicly and to be represented by counsel to present evidentiary facts;

(b) Except as provided herein, an appeal shall be decided by the board only after a hearing; The board shall not deny, reject or sustain an appeal, or make any other determination relating to an appeal, except after a hearing is conducted pursuant to the provisions of this section;

(c) The board may deny a hearing to an employee who has failed to file an appeal within the time prescribed by this section; and to an unclassified employee who has failed to state the cause for which he has been dismissed. The board

shall notify the employee of its denial in writing and shall inform the employee of his right to appeal such denial under the provisions of KRS 18A.100;

(d) Any investigation by the board of any matter related to an appeal filed by an employee shall be conducted only upon notice to the employee, the employee's counsel, and the appointing authority. All parties to the appeal shall have access to information produced by such investigations and such information shall be presented at the hearing. Any party to the hearing shall be permitted an adequate opportunity to rebut or comment upon such information;

(e) Each appeal shall be decided on its merits and the board shall base its decision upon the evidence, facts, and information contained in the record.

(19) At the hearing of such appeals, technical rules of evidence shall not apply. Upon its own motion or upon request by a party, the board may require the production by a party, a state employee or a state agency of documents, records, and other material relevant to the appeal.

(20) Each appeal shall be decided individually, unless otherwise agreed by the parties and the board. The board shall not:

(a) Employ class action procedures; or

(b) Conduct test representative cases.

(21) A board member or an employee of the board shall neither initiate, participate in, nor consider ex parte communications concerning a pending or impending proceeding before the board, except as specifically authorized by administrative regulation of the board in the conduct of a prehearing mediation and settlement procedure formally established by the board under KRS Chapter 13A. Board members shall abstain from public comment about a pending or impending proceeding before the board. This shall not prohibit board members from making public statements in the course of their official duties or from explaining for public information the procedures of the board.

(22) (a) An appeal to the board may be heard by the full board or one (1) or more of the following: Its executive director, its general

counsel, any nonelected member of the board, or any of its hearing officers hired by personal service contract.

(b) Any appeal heard by less than the full board shall be reviewed by the full board before a final order of the board is issued:

1. Prior to a final order of the board, the board shall provide a copy of the findings of fact and recommendations to the parties to the appeal and shall provide them with an opportunity to submit written exceptions and responses to such findings of fact and recommendations. At the request of a party or on its own motion, the board shall permit oral argument before the full board. Such request shall be filed with the board within fifteen (15) days of the recommended order issued by a member, the executive director, or a hearing officer; and

2. The board shall review the record of the evidence presented, the findings of fact and recommendations of the hearing officer, and the written exceptions and responses filed by parties to the appeal.

(23) (a) If the board finds that the action complained of was taken by the appointing authority in violation of laws prohibiting favor for, or discrimination against, or bias with respect to his political or religious opinions or affiliations or ethnic origin, or in violation of laws prohibiting discrimination because of such individual's sex or age or handicap, the appointing authority shall immediately reinstate the employee to his former position or a position of like status and pay, without loss of pay for the period of his penalization, or otherwise make the employee whole;

(b) If the board finds that the action complained of was taken without just cause, the board shall order the immediate reinstatement of the employee to his former position or a position of like status and pay, without loss of pay for the period of his penalization, or otherwise make the employee whole;

(c) If the board finds that the action taken by the appointing authority was excessive or erroneous in view of all the surrounding circumstances, the board shall alter, modify or rescind the disciplinary action;

(d) In all other cases, the board shall rescind the action taken or otherwise grant such other relief to which the employee is entitled.

(24) If a final order of the board is appealed, a court shall award reasonable attorney fees to an employee who prevails by a final adjudication on the merits as provided by KRS 453.260. Such award shall not include attorney fees attributable to the hearing before the board.

(25) When any employee is dismissed and not ordered reinstated after such appeal, the board in its discretion may direct that his name be placed on an appropriate reemployment list for employment in any similar position other than the one from which he had been removed.

(26) After a final decision has been rendered by the board or court, an employee who prevails in his appeal shall be credited with the amount of leave time used for time spent at his hearing before the board or court. Employees who had an insufficient amount of leave time shall be credited with leave time equal to the amount of time spent at their hearings before the board or court.

(27) The board shall, within sixty (60) days after an appeal is filed, hear the appeal, and shall, within ninety (90) days after an appeal is filed, issue a final determination for the disposition thereof.

(28) If the appointing authority appeals the final order of the board unless the board rules otherwise, the reinstated employee shall remain in his former position, or a position of like status or pay, until the conclusion of the appeals process, at which time the appointing authority shall take action in accordance with the court order.

History: 1988 c 250, §1, eff. 7-15-88; 1986 c 494, §16; 1982 c 448, §19

Ky. Rev. Stat. Ann. 61.102 Reprisal against public employee for disclosure of violations of law prohibited; construction of statute

(1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the attorney general, the auditor of public accounts, the general assembly of the Commonwealth of Kentucky or any of its members or employees, the legislative research commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any other appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, or endangerment of public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure or divulgence.

(2) This section shall not be construed as:

(a) Prohibiting an employer from requiring that an employee inform him of an official request made to an agency for information, or the substance of testimony made, or to be made, by the employee to legislators on behalf of an agency;

(b) Permitting the employee to leave his assigned work area during normal work hours without following applicable law, administrative regulations, rules, or policies pertaining to leave, unless the employee is requested by a legislator or a legislative committee to appear before a legislative committee;

(c) Authorizing an employee to represent his personal opinions as the opinions of his employer; or

(d) Prohibiting disciplinary or punitive action if an employee discloses information which he knows:

1. To be false or which he discloses with reckless disregard for its truth or falsity;
2. To be exempt from required disclosure under the provisions of KRS 61.870 to 61.884; or
3. Is confidential under any other provision of law.

History: 1986 c 301, §2, eff. 7-15-86

Supreme Court, U.S.
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No. 94-348

In The

Supreme Court of the United States

October Term, 1994

COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES, DARVIN ALLEN, P. KENNETH COX, JOHN HODGKIN, RONALD HOLLAND, LYNNE MCWILLIAMS, MARGARET WHITTET AND FRANK J. WILLEY,

Petitioners,

versus

MAGGIE WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are state officials who are not entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), because they could not reasonably conclude that an employee's charges of political corruption were false statements knowingly and recklessly made and that harm to government operations outweighed the employee's interest in speaking freely, pursuant to *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983), nevertheless entitled to qualified immunity under *Waters v. Churchill*, 511 U.S. ___, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994)?

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No. 94-348

In The

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COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES, DARVIN ALLEN, P. KENNETH COX, JOHN HODGKIN, RONALD HOLLAND, LYNNE MCWILLIAMS, MARGARET WHITTET AND FRANK J. WILLEY,

Petitioners,

versus

MAGGIE WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Maggie Williams respectfully submits this brief in opposition to the petition for writ of certiorari filed by petitioners Commonwealth of Kentucky, Cabinet For Human Resources, Darvin Allen, P. Kenneth Cox, John Hodgkin, Ronald Holland, Lynne McWilliams, Margaret Whittet, and Frank J. Willey.

STATEMENT OF THE CASE

The relevant facts and ruling below are set forth in the Sixth Circuit opinion and the District Court Memorandum Opinion. [Petition For A Writ Of Certiorari And Appendix (hereafter "Pet."), pp. A1-A7, A30-33]. Petitioners' statement of the case not only is burdened with irrelevancies, [Pet. pp. 3-5], but also fails to set forth many relevant facts and misstates others. These errors and omissions relate to dispositive matters here.

First. Petitioners well knew, and there is no dispute about, the content of respondent Maggie Williams' ("Williams") speech at the time they removed and demoted her. She made her comments and reports about political corruption directly to petitioners themselves. Williams told her supervisors and supervisees that she believed the Wilkinson Administration political hiring and promotion effort violated the state merit system law. [Pet. p. A3]. Williams reported to Cox and Hodgkin that she believed Gibson was engaging in unlawful political activities on the job, using office telephones in his private business, and falsifying travel vouchers – one of which she sent to Cox. [Pet. p. A3]. She formally recommended to Cox, Whittet, and Willey that Gibson's employment with the state be terminated because of his political activities on the job. [Pet. p. A3]. Similarly, Williams told Hodgkin, Allen, Whittet, and Holland directly that she suspected that Little had "bought" her job (*i.e.* made a monetary contribution to the Governor in order to be appointed to Williams' position as Manager of the Winchester DES office), was making job referrals on political grounds, soliciting or accepting gratuities from job referral applicants, and had criminally vandalized her car.

[Pet. p. A4]. She formally reprimanded Little for engaging in partisan political activities on the job – which Hodgkin knew directly through Little's formal grievance. [Pet. p. A4]. Williams' statements and reports about Gibson and Little were one of the express bases for her removal and demotion. [Joint Appendix ("JA") No. 67, R 127, Deposition of James F. Thompson 6/25/92, pp. 246-247]. Petitioners made no claim below and make no claim here they were unaware of her comments and reports of political corruption. [Pet. p. A9].

Second. There is no evidence in the record that Williams' statements and reports of political corruption were false statements knowingly or recklessly made. Petitioners erroneously state that Williams' charges of political corruption were determined by the Office of Inspector General ("OIG") to be "false." [Pet. p. 14]. The OIG report made no such findings. Petitioners also erroneously imply that Williams made her statements after they had been "discredited" by the OIG investigation. [Pet. p. 18]. Williams did not know the contents of the OIG report until it was produced by petitioners during discovery in this action, long after she had made her statements and reports. Petitioners also misleadingly imply that Williams admitted that her charges about the selling of job referrals were false. [Pet. p. 18]. While Williams admitted she could not prove rumors about Little selling job referrals twenty (20) years ago, [Pet. p. A13 n 3], the statements at issue here related to his then-current politically corrupt actions. [Pet. p. A4]. Petitioners imply that the Sixth Circuit concluded that petitioners "reasonably believed" that Williams' statements and reports were "groundless and malicious rumor-mongering" and false. [Pet. pp. 15,

19]. In fact, the Sixth Circuit concluded that petitioners had no factual basis for believing Williams' statements were false, [Pet. p. A13], and there is evidence of record proving the truth of Williams' statement that Gibson falsified travel vouchers, [Pet. p. A3], and Little engaged in prohibited political activity on the job. [Pet. p. A4].

Third. There is no evidence in the record of office "disruption" caused by Williams' speech, other than the alienation of Gibson and Little toward her because of her reports about their illegal activities. [Pet. p. A14]. Petitioners state that Gibson's resignation, Allen's memorandum prohibiting "derogatory comments," and employee complaint letters were "hard evidence" of office disruption which was "lightly" rejected by the Sixth Circuit. [Pet. pp. 18-19]. To the contrary, the Sixth Circuit held that these "disruptions" were not caused by Williams' comments about political corruption. [Pet. p. A14]. Moreover, Gibson's resignation was beneficial "disruption," Allen's memorandum was retaliatory, and the complaint letters about Williams' "behavior," solicited by petitioners themselves, were unrelated to Williams' statements and reports on political corruption. [Pet. pp. A3, A14, A32-A33].

REASONS FOR DENIAL OF THE WRIT

The Sixth Circuit properly analyzed petitioners' actions under the "objective reasonableness" standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), to determine

whether their conduct fell "clearly within the area" protected by the First Amendment, "such that a reasonable official would have known that his or her conduct violated" Williams' constitutional right. [Pet. pp. A8-A9]. Applying that standard, the court correctly determined that under the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 140 (1983), petitioners could not have reasonably believed Williams' statements were false nor outweighed by the state's interest in governmental efficiency. [Pet. pp. A10-A15]. For the same reasons, petitioners' conduct also failed the new reasonableness test required by *Waters v. Churchill*, 511 U.S. ___, 128 L.Ed.2d 686, 114 S.Ct. 1878, 1888-1890 (1994); *id.* at 1893 (SOUTER, J., concurring); *id.* at 1898-1900 (STEVENS, J., concurring in the judgment).

Petitioners contended below, as they do here, that Williams' speech was not constitutionally protected since they "reasonably" believed her statements were false. The lower court correctly noted that the proper standard is whether petitioners could "reasonably believe" that Williams made her statements "with knowledge of, or reckless indifference to, their falsity." [Pet. p. A12]. The court found no basis for any such "reasonable belief" by petitioners:

> The first point we note about defendants' argument is that it does not address Williams' statements that were critical of political patronage employment practices in general. These stated opinions cannot be considered false statements at this juncture. As to Williams' statements and reports about specific politically corrupt activities by employees at the Winchester DES office,

> defendants point to no proof in the record that Williams' comments were false statements . . . Therefore, there is nothing from which we could infer that a reasonable official could have believed that Williams' statements were false statements knowingly or recklessly made.

Id.

The Sixth Circuit also employed a reasonableness standard to determine whether Williams' interest in speaking freely on a matter of public concern was outweighed by the state's interest in promoting the efficiency of public services. [Pet. p. A13]. The court noted:

> [W]e must decide whether defendants reasonably could have believed that the harm to the office's efficiency outweighed Williams' interest in speaking freely.

Id. In striking the "*Pickering/Connick* balance" against petitioners, the lower court determined that "no reasonable official" could have believed that the state's interest in efficient operations outweighed Williams' interest in commenting on political patronage hiring and promoting practices and reporting specific instances of political misconduct. [Pet. p. A14]. Specifically, the lower court held that:

> As to Williams' statements criticizing the political patronage hiring and promoting practices, no reasonable official could have believed that the state's interest in efficient operations outweighed Williams' interest in commenting on these matters. . . . As to Williams' statements and reports about specific instances of political patronage and politically corrupt practices in

> the office, there is one countervailing state interest. These statements and reports did have the effect of creating disharmony between Williams and the employees she reported, Gibson and Little. However, no reasonable official could conclude that this interest outweighed Williams' interest in reporting these instances of political misconduct.

Id. The court thus held that Williams had spoken out on matters of great public concern with minimal effect on the efficiency of the office, and no reasonable official could have concluded otherwise. [Pet. p. A15].

Petitioners contend here that Waters makes binding on federal courts the "facts as reasonably found by the State Officials," and argue that the Sixth Circuit used "the wrong version of the facts," namely, "the plaintiff's version of the facts rather than the facts as reasonably found by the State Officials," then erroneously required petitioners to prove Williams' statements and reports were false. [Pet. pp. 15, 16]. These contentions are without merit.

First. *Waters* expressly rejects the proposition that the court is bound by the employer's version of the facts:

> [W]e do not believe that the court must apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. . . . It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient. . . . *We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the*

> *employer reasonably found them to be.* (Emphasis added).

Waters v. Churchill, supra, at 1889; *id.* at 1893 (the reasonableness test enunciated by the *Waters'* plurality "is clearly the one that lower courts should apply.") (SOUTER, J., concurring). The new constitutional reasonableness requirement imposed on public employers by *Waters* is to be enforced by the courts – not the employers.

Moreover, it is clear under *Waters* that courts should conclude that a public employer cannot draw a "reasonable" conclusion as to the facts without substantial evidence to support that belief:

> It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available.

Id. at 1889. Consistent with these requirements, the Sixth Circuit found there is no evidence from which petitioners could reasonably conclude that Williams' statements were false statements made knowingly or recklessly, [Pet. p. A13], nor to conclude that the state's interest in governmental efficiency outweighed Williams' interest in exposing political corruption. [Pet. p. A14]. In fact, the lower court held that the "*Pickering/Connick* balance" tilts so strongly against petitioners on this record that any possible "imprecision" in its standard makes no difference here. [Pet. p. A15]. The result under *Waters* would be the same.

Second. The Sixth Circuit did not use the "wrong" version of the facts in performing this "*Pickering/Connick* balance." To the contrary, the Sixth Circuit used the only "version" of the facts that exists in this record, specifically, Williams' statements and reports on political corruption for which she was removed and demoted. These were constitutionally protected unless petitioners proved they were false statements made knowingly or with reckless indifference to their truth. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Pickering v. Board of Education, supra*, at 821. Petitioners failed to prove that Williams' statements were "false," much less that they were false statements made knowingly or recklessly. [Pet. pp. A12, A13]. The result under *Waters* would be the same.

Third. The lower court did not err by imposing on petitioners the burden of proving that Williams' statements were false. [Pet. p. 15]. That burden is imposed by *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965) (government must bear the burden of proving that speech is unprotected) and *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (same). *Waters* did not "lift" that burden from petitioners. *Waters v. Churchill, supra*, at 1884, 1887 (government must make a substantial showing that employee speech on public matters is likely to be disruptive before such speech can be punished). Far from modifying or repudiating these principles, the *Waters* decision is predicated on them. By imposing an additional constitutional requirement and burden of proof on public employers, the *Waters* court did not thereby relieve them of their existing ones. Petitioners simply failed to carry their settled burden of proof on the falsity issue. *See* Federal Rules of Civil Procedure, Rule 56(e); *Celotex Corp. v. Catrett*, 477

U.S. 317, 322 (1986) (summary judgment should be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial). The result under *Waters* would be the same.

In the final analysis, petitioners' stated grounds for review rest on a fatal flaw. There is no evidence in this record to support a *Waters'* "reasonable belief" in the falsity of Williams' speech. The *Pickering/Connick* test is to be applied to the speech for which Williams was fired. *Waters, supra,* at 1890. Petitioners must have reasonably believed Williams' speech was unprotected, *id.* at 1888, and a conclusion that it was false based on "no evidence at all" is an unreasonable belief. *Id.* An unreasonable belief that speech is false is pretextual and cannot shield disciplinary action taken because of an employee's protected speech. *Waters, id.* at 1890-1891 (SOUTER, J., concurring). The Sixth Circuit found that "defendants here point to nothing in the record that contradicts Williams' statements and reports." [Pet. p. A13]. The result under *Waters* would be the same.

CONCLUSION

The ruling below is not in conflict with *Waters* and raises no important unresolved questions for other public employers. The petition for writ of certiorari should be denied.

Respectfully submitted,

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